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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No.

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY, PETITIONER,

vs.

MAYME F. MEREDITH.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SEVENTH JUDICIAL DISTRICT OF THE STATE OF OHIO.

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IN COMMON PLEAS COURT OF LAKE COUNTY, OHIO

No. 11484

MAYME F. MEREDITH, Plaintiff,

vs.

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY, Defendant

DOCKET AND JOURNAL ENTRIES

1930, Apr.	19.	Petition and Precipe, filed.
1930, Apr.	19.	Summons issued with copy of Petition. (Lake Co.).
1930, Apr.	23.	Summons returned endorsed: Serv. & Ret. .... .75 Mileage .... .48 1.23 Received this Writ April 19, 1930, at 11 o'clock A. M. And on April 22, 1930, I served the within named Fairport, Painesville & Eastern R. R. Co. by serving L. L. Dixon, Manager, by personally handing to each of them a true and certified copy thereof with all the endorsements thereon. James Moloney, Sheriff, by Arthur S. Rand, Deputy.
1930, May	14.	Motion to make petition more definite & certain, filed.
1930, May	14.	Brief on motion to make Petition more definite & certain, filed.
1930, May	14.	Motion to strike from Petition, filed.
1930, May	14.	Brief on Motion to strike from Petition, filed.
1930, May	21.	Amended Petition, filed.
1930, June	28.	J. E. filed: Defendant given leave to move or plead on or before July 5th, 1930. Jr. 36—pg. 124.
1930, July	5.	Answer to Amended Petition, filed.

1930, Nov. 10. Motion to plaintiff to continue filed.

1930, Nov. 10. J. E. filed: Motion to continue granted. Jr. 36—Pg. 499.

1931, Oct. 13. Jury impaneled and sworn. Continued to Oct. 14, 1931. Jr. 38—Pg. 284.

1931, Oct. 14. Motion filed for directed Verdict.

1931, Oct. 14. Trial to jury. Continued to Oct. 15, 1931. Jr. 38—Pg. 293.

1931, Oct. 15. Trial to jury. Continued to Oct. 16, 1931. Jr. 38—Pg, 299.

1931, Oct. 16. Motion filed for directed Verdict.

1931, Oct. 16. Trial to jury. Continued to Oct. 17, 1931. Jr. 38—Pg. 301.

1931, Oct. 17. Trial to jury. Continued to Oct. 19, 1931. Jr. 38—Pg. 303.

1931, Oct. 19. Verdict, filed.

1931, Oct. 19. This day being a day in the September Term of Court, the following proceedings were had herein, to-wit:

This day to-wit, October 19th, 1931, again came, the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn and the trial proceeded.

And the said jury retired to their room, in charge of the Bailiff for deliberation.

And now come the said jury into open court, with their verdict in writing, signed by each concurring juror, and say:

"We, the Jury, being duly impaneled and sworn find the issues in this case in favor of the Plaintiff, and assess the amount due to the Plaintiff from the Defendant the said The Fairport, Painesville & Eastern Railroad Company at the sum of ($20,000) Twenty thousand—no/100 Dollars.

And we do so render our verdict upon the concurrence of 12 members of our said Jury, that being three-fourths or more of our number. Each of said jurors concurring in said verdict signs his name hereto this 19th day of October 1931.

E. B. Bartlett, Bertha Sherwood, Hulda M. Schultz, Mary B. Kopf, Gertrude Drake, F. E. Rand, T. Barkley, Fred Guthleben, William Gifford, William Uransky, Arthur G. Stamm, F. B. Stearns. Walter D. Jones, Judge.

[fol. 2a]

1931, Oct. 20. Motion for New Trial, filed.
1931, Oct. 21. Reply filed.
1931, Nov. 21. Affidavit of George E. Mather, filed.
1931, Nov. 21. Affidavit of Elbert F. Blakely, filed.
1931, Dec. 1. Brief of Defendant on Motion for a New Trial, filed.
1932, Feb. 8. Bill of Exceptions, filed.
1932, Feb. 9. Notice of filing Bill of Exceptions, issued.
1932, Feb. 12. Notice of filing Bill of Exceptions returned and filed.
1932, Feb. 19. This day being a day in the January Term of Court, the following proceedings were had herein, to-wit:

This day this cause came on to be heard on the motion of the defendant to set aside the verdict of the jury heretofore rendered herein, and to grant a new trial; upon due consideration thereof the Court overrules the motion for new trial, to which defendant excepts.

It is therefore considered, ordered and decreed by the Court that the plaintiff recover from the defendant the said sum of Twenty Thousand Dollars ($20,000.00), the amount of the verdict heretofore rendered herein, together with her costs herein expended. To all of which the defendant duly excepts and is hereby granted leave to prepare and file its Bill of Exceptions herein, according to the statutory provisions. Walter D. Jones, Judge.

Approved: Anderson & Lamb, Attorneys for Plaintiff. Harry T. Nolan & Alvord, Blakely & Ostrander, Attorneys for Defendant.

1932, Feb. 19. Bill of Exceptions, refiled; same having been filed heretofore and prior to filing of Journal Entry overruling Motion for New Trial.

1932, Feb. 23. Bill of Exceptions allowed and signed by Trial Judge.

1932, March 19. Undertaking in Error filed.

1933, Aug. 21. Mandate filed from Court of Appeals.

[fol. 3a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

No. 11484

MAYME F. MEREDITH, 279 Avery Terrace, Painesville, Ohio, Plaintiff,

vs.

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD CO., Painesville, Ohio, Defendant

PETITION—Filed April 19, 1930

Plaintiff says that the defendant, The Fairport, Painesville & Eastern Railroad Company is a corporation and as such operates an interstate and intrastate railway in the State of Ohio; that said line owned, managed and controlled by the defendant, intersects at substantially right angles a public thoroughfare between Painesville and Painesville-On-The-Lake, said public highway running generally northerly and southerly and being known as Hardy Road and crossing said railroad at grade.

Plaintiff says that on or about the 19th day of July, 1929 she was driving an automobile which was proceeding southerly on said road as it approached said crossing; that at or about the same time a westerly bound train consisting of an engine pulling a string of cars of about approximately thirty two was approaching said crossing; that the approach of said train to said highway crossing was not signalled by the sounding of a whistle in the way of giving timely and proper warning or by the continuous ringing of a bell.

Plaintiff says that said railroad train consisting of practically thirty-two cars approached said grade crossing at about ten miles per hour and that the approach of said railroad train was obscured by many trees which were along [fol. 4a] said highway and extended down to and along said railroad right of way; that this plaintiff was operating her said automobile within the maximum speed provided by the laws of the State of Ohio; that the said right of way of said railroad company was practically level as it approached and crossed said highway and it continued practically level for some distance the other direction, and that said automobile was struck by said locomotive engine; that said highway was paved and improved and was at all the times herein mentioned and for a long time prior thereto, used with extreme frequency by members of the traveling public and that its frequent use both day and night was fully known to the officials of the defendant and to the men employed by said defendant, who were at said time operating said train of thirty-two cars; that said locomotive engine pulling said thirty-two cars was not in forward motion but in backward motion; that the pilot part of the locomotive engine was coupled onto the first of the thirty-two cars; that the tender thereof, or the part known as the tender, which is coupled to the motor part of the locomotive engine, was the first part of the train to reach said crossing; that in charge of the operation of said locomotive engine was one Austin, the engineer, and one Ford, the fireman; that twenty-three of the said thirty-two cars were loaded with coal and stone and that one James Doubledee was conductor and was in charge of the full crew and train, whereas the said locomotive engineer was in charge and direction of those upon the locomotive engine; that said train being so operated had been moved, before the defendant coupled onto said cars, by The New York Central Railroad Company; that shortly prior to the times mentioned, this same crew in charge of said locomotive engine had delivered to The New York Central Railroad Company approximately forty cars; that before said thirty-two cars were moved by said crew and locomotive engine, the said conductor passed along the side of said standing cars which were then coupled and, all of them standing on the same track and obtained the numbers of the cars and then went to the rear end and from that time remained on the rear end; that in obtaining said numbers there was no need of any haste or hurry, nor was there any; that in the obtaining of the numbers no [fol. 5a] attention was given by said conductor to the air hose or the train line; that said thirty-two cars had been delivered all coupled together, ~~each coupled~~ to the other, by The New York Central Railroad Company; that all of said cars were of standard construction and had a standard guage and complied with the Federal laws in reference thereto; that said conductor was accompanied by one of his brakemen in going to the rear of said thirty-two cars; that when said conductor got to the rear of said cars he signalled for the cars to be moved and he thereafter went upon the rear car which was a hopper car loaded with coal and stood on the coal in said car while the train was hauled toward said highway crossing; that before moving said train or causing same to be moved the said conductor could have, without hindrance or any unnecessary delay, had the air which had been generated and which was stored in its proper place on said locomotive engine, placed in sufficient force in the train line on all of said coupled cars to have controlled the operation of all of the brakes on said thirty-two cars by air and yet the said conductor did not cause the air to be used on said train and knew that none of the brakes on said thirty-two cars could be operated by reason of air, and so far as operation was concerned, that all would have to be through the manual efforts of some member of the crew; that upon the thirty-two cars there were two hundred and fifty-six brake shoes that were approximately three and one-half inches wide and approximately sixteen inches long.

Plaintiff says that the said tender of said locomotive engine struck said automobile while it was moving about ten miles per hour; that it thereafter carried said automobile upon the front end of the tender for approximately seven hundred to eight hundred feet and for practically all of said distance this plaintiff and her daughter were in the said automobile, which was a closed car, and were in no way injured; that if said train could have been stopped short of the distance that it moved no injury would have come to this plaintiff or her daughter; that the reason that said train was not stopped many, many feet of less distance was because there were absolutely no air brakes used nor could same to used because of the failure of the conductor [fol. 6a] and other members of the crew to turn the angle cock on the front of the nearest car to said locomotive engine and thereby permit the air to go into the train line at such pressure that all of the Two Hundred and Fifty-Six brake shoes could have been properly applied to the moving wheels under said cars; that the amount of air stored upon the locomotive engine and ready for immediate use was seventy pounds to the square inch; that after said train had approximately moved seven to eight hundred feet, then by reason of the inequality in height of the ties constituting said road bed, the said automobile was caused to be forced under the first wheels of the backing tender, and at that time, and not until that time, the occupants of said automobile were forced under the wheels and greatly and permanently injured and that the automobile in that position, under the wheels of the tender, caused the train to stop as no brakes were used on any of the cars in checking the speed or stopping the train.

That the said dangerous position of said occupants of said automobile was known and fully appreciated by said members of said crew for one member of such crew, a brakeman, was riding on the front end of the moving train, to-wit, on the end of the tender and therefore such actual danger was actually known to the said crew for all of such distance; that nothing could be done by any member of the crew upon any one of the thirty-two cars that would materially check the movement of said train and all of the brakes on said locomotive engine had been applied at or near to the highway crossing, all of which was proximately produced by the failure to use and apply said stored air.

Plaintiff says that approximately by reason of said automobile in which she had been carried safely upon the front of said train for seven or eight hundred feet being forced under the wheels of said tender she was caused the following injuries: Amputation of the right leg between the knee and hip; injuring the flesh, muscles, ligaments, bones [fol. 7a] and nerves of the left leg, tearing and bruising the flesh for many inches long and many inches wide; that by reason of such injuries said left leg in its use and functioning has been practically destroyed; that said injuries produced a shock to plaintiff's whole nervous system thereby producing traumatic neurasthenia.

Plaintiff says that all of her said injuries were directly and proximately produced through the negligence, carelessness and unlawful conduct of the defendant company in this, to-wit:

First. In causing and permitting said collision as aforesaid.

Second. In failing to give proper and sufficient warning of the approach of said train as provided by the statutory laws of the State of Ohio which were than in full force and effect.

Third. In causing plaintiff said injuries when the defendant, through its employees, actually knew of the great danger in which plaintiff was placed so that said defendant had ample time in the exercise of ordinary care to have prevented said injuries after they had such actual knowledge.

Fourth. In operating said train along said right of way, thirty-two cars in length, without coupling the air then stored in the locomotive engine so that it could be used in the train line for the purpose of immediately and instantly applying the brakes as aforesaid.

Fifth. In failing and neglecting to couple the train line and air hose before starting toward the place of the accident after said employees had ample time and opportunity to connect and couple and use the air in the application of said brake shoes and in attempting to operate said train across the public highway as aforesaid without having sufficient mechanical ability to stop said train and prevent injuries to the members of the traveling public as aforesaid.

Sixth. In failing to obey the laws of the state and the United States which were then in full force and effect in reference to maintaining and the use of air in and on said cars of said train which would have supplied full force for the application of all the brakes as aforesaid.

Plaintiff says that by reason of said injuries she has suffered pain of mind and body and will continue to suffer [fol. 8a] in the future and that she has been made a cripple for life; that by reason thereof she has been damaged in the sum of One Hundred Thousand Dollars, for which, together with costs judgment is asked.

Anderson & Lamb, Attorneys for Plaintiff.

[fol. 9a] *Duly sworn to by Mayme F. Meredith. Jurat omitted in printing.*

IN COURT OF COMMON PLEAS OF LAKE COUNTY

PRÆCIPE FOR SUMMONS—Filed April 19, 1930

To the Clerk:

Issue summons for the defendant, directed to the sheriff, returnable according to law and endorse same, "Action for money only, damages, amount claimed, $100,000.00."

Anderson & Lamb, Attorneys for Plaintiff.

[fol. 9½a] [File endorsement omitted.]

[fol. 10a] IN COMMON PLEAS COURT OF LAKE COUNTY

SUMMONS AND RETURN—Filed April 23, 1930

The State of Ohio, Lake County

To the Sheriff of Lake County:

You are hereby commanded to notify The Fairport, Painesville & Eastern Railroad Co., Painesville, Ohio, that it has been sued by Mayme F. Meredith, 279 Avery Terrace, Painesville, Ohio, in the Court of Common Pleas of said Lake County, and must answer by the 17th day of May, A. D. 1930, or the petition of said plaintiff will be taken as true, and judgment rendered accordingly.

Said Sheriff will make due return of this summons on the 28th day of April, 1930.

Witness my hand and the seal of said Court, this 19th day of April, 1930.

Elizabeth S. Murphy, Clerk, by Gertrude H. Connor, Deputy. (Seal Common Pleas Court, Lake County, Ohio.)

Sheriff's Return

THE STATE OF OHIO,
Painesville, Lake County:

Sheriff Fees

Service & Return, first name	$.75
Additional names, at 25c	
6 miles traveled at 8c	.48
Total	$1.23

Received this Writ April 19, 1930, at 11 o'clock A. M., and on April 22, 1930, I served the within named Fairport, Painesville & Eastern R. R. Co. by serving L. L. Dixon, Manager, by personally handing *to each of them* a true and certified copy thereof with all the endorsements thereon.

And on —— —, 19—, I served the within named —— —— by leaving for each of them at their usual place of residence, a true and certified copy thereof with all the endorsements thereon.

James Moloney, Sheriff, by Arthur S. Rand, Deputy.

[File endorsement omitted.]

[fol. 11a] In Court of Common Pleas of Lake County

[Title omitted]

Motion to Strike—Filed May 11, 1930

Now comes the defendant and moves to strike from the petition of the plaintiff, as a pleading of evidence, as irrelevant and as improper pleading, the following:

1. On pages 2 and 3 beginning in the eleventh line from the bottom of page 2, the words

"that said train being so operated had been moved, before the defendant coupled onto said cars, by The New York Central Railroad Company; that shortly prior to the times mentioned, this same crew in charge of said locomotive engine had delivered to The New York Central Railroad Company approximately forty cars; that before said thirty-two cars were moved by said crew and locomotive engine, the said conductor passed along the side of said standing cars which were then coupled and all of them standing on the same track and obtained the numbers of the cars and then went to the rear end and from that time remained on the rear end; that in obtaining said numbers there was no need of any haste or hurry, nor was there any; that in the obtaining of the numbers no attention was given by said conductor to the air hose or the train line; that said thirty-two cars had been delivered all coupled together, each coupled to the other, by The New York Central Railroad Company."

and each separate phrase thereof.

2. On page 3 beginning in the fifth line thereof, the words

"that said conductor was accompanied by one of his brakemen in going to the rear of said thirty-two cars; that when said conductor got to the rear of said cars he signalled for the cars to be moved and he thereafter went upon the rear car which was a hopper car loaded with coal and stood on the coal in said car while the train was hauled toward said [fol. 12a] highway crossing; that before moving said train or causing same to be moved the said conductor could have, without hindrance or any unnecessary delay, had the air which had been generated and which was stowed in its proper place on said locomotive engine, placed in sufficient force in the train line on all of said coupled cars to have controlled the operation of all of the brakes on said thirty-two cars by air and yet the said conductor did not cause the air to be used on said train and knew that none of the brakes on said thirty-two cars could be operated by reason of air, and so far as operation was concerned, that all would have to be through the manual efforts of some member of the crew; that upon the thirty-two cars there were two hundred and fifty-six brake shoes that were approximately three and one-half inches wide and approximately sixteen inches long."

and each separate phrase thereof.

3. On page 4 beginning in the tenth line, the words

"the occupants of said automobile were"

4. On page 4 beginning in the fifteenth line thereof, the words

"of said occupants".

5. On page 5 in the fifth ground of negligence alleged, the words

"after said employees had ample time and opportunity to connect and couple and use the air in the application of said brake shoes" and the following words,

"and prevent injuries to the members of the travelling public as aforesaid"

and each of said phrases.

Respectfully submitted, Alvord, Blakely & Ostrander,
Attorneys for Defendant.

[fol. 12½a] [File endorsement omitted.]

[fol. 13a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

MOTION TO MAKE PETITION MORE DEFINITE AND CERTAIN—Filed May 14, 1930

Now comes the defendant and moves the court to compel the plaintiff to make her petition herein more definite and certain in the following respects, to-wit:

1. That plaintiff state whether or not she drove the automobile in which she was riding upon the railroad track of the defendant company at said highway crossing.

2. That plaintiff state whether the automobile which she was driving collided with the engine and [illegible] of cars of defendant company at said highway crossing or at some other place, and if at another place, then at what point.

Alvord, Blakely & Ostrander, Attorneys for Defendant.

[fol. 13½a] [File endorsement omitted.]

[fol. 14a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

AMENDED PETITION—Filed May 21, 1930

Plaintiff, by leave of Court first had, files this, her amended petition and says that the defendant, The Fairport, Painesville & Eastern Railroad Company is a corporation and as such operates an interstate and intrastate railway in the State of Ohio; that said line owned, managed and controlled by the defendant, intersects at substantially right angles a public thoroughfare between Painesville and Painesville-On-The-Lake, said public highway running generally northerly and southerly and being known as Hardy Road and crossing said railroad at grade.

Plaintiff says that on or about the 19th day of July, 1929, she was driving an automobile which was proceeding southerly on said road as it approached said crossing; that at or about the same time a westerly bound train consisting of an engine pulling a string of cars of about approximately thirty-two was approaching said crossing; that the ap- [fol. 15a] proach of said train to said highway crossing was not signalled by the sounding of a whistle in the way of giving timely and proper warning or by the continuous ringing of a bell.

Plaintiff says that said railroad train consisting of practically thirty-two cars approached said grade crossing at about ten miles per hour and that the approach of said railroad train was obscured by many trees which were along said highway and extended down to and along said railroad right of way; that this plaintiff was operating her said automobile within the maximum speed provided by the laws of the State of Ohio; that the said right of way of said railroad company was practically level as it approached and crossed said highway and it continued practically level for some distance the other direction, and that said automobile was struck on said grade crossing by said locomotive engine or the tender thereof; that the part of said train which collided with the said automobile in which plaintiff was a passenger and which was being driven by her mother was that part of the locomotive engine known as the tender; that said highway was paved and improved and was at all the times herein mentioned and for a long time prior thereto used with extreme frequency by members of the travelling public and that its frequent use both day and night was fully known to the officials of the defendant and to the men employed by said defendant, who were at said time operating said train of thirty-two cars; that said locomotive engine pulling said thirty-two cars was not in forward motion but in backward motion; that the pilot part of the locomotive engine was coupled onto the first of the thirty-two cars; that the tender thereof, or the part known as the tender, which is coupled to the motor part of the locomotive engine, was the first part of the train to reach said crossing; that in charge of the operation of said locomotive engine was one Austin, the engineer, and one [fol. 16a] Ford, the fireman; that twenty-three of the said thirty-two cars were loaded with coal and stone and that one James Doubledee was conductor and was in charge of the full crew and train, whereas the said locomotive engineer was in charge and direction of those upon the locomotive engine; that all of said cars were of standard construction and had a standard guage and complied with the Federal laws in reference thereto.

Plaintiff says that the said tender of said locomotive engine struck said automobile while it was moving about ten miles per hour; that it thereafter carried said automobile upon the front end of the tender for approximately seven hundred to eight hundred feet and for practically all of said distance this plaintiff and her daughter were in the said automobile, which was a closed car, and were in no way injured; that if said train could have been stopped short of the distance that it moved no injury would have come to this plaintiff or her daughter; that the reason that said train was not stopped many, many feet of less distance was because there were absolutely no air brakes used nor could same be used because of the failure of the conductor and other members of the crew to turn the angle cock on the front of the nearest car to said locomotive engine and thereby permit the air to go into the train line at such pressure that all of the Two Hundred and Fifty-six brake shoes could have been properly applied to the moving wheels under said cars; that the amount of air stored upon the locomotive engine and ready for immediate use was seventy pounds to the square inch; that after said train had approximately moved seven to eight hundred feet, then by reason of the inequality in height of the ties constituting said road bed, the said automobile was caused to be forced under the first wheels of the backing tender and at that time, and not until that time, the plaintiff was forced under the [fol. 17a] wheels and greatly and permanently injured and that the automobile in that position, under the wheels of the tender, caused the train to stop as no brakes were used on any of the cars in checking the speed or stopping the train.

That the said dangerous position of said plaintiff was known and fully appreciated by said members of said crew for one member of such crew, a brakeman, was riding on the front end of the moving train, to wit: on the end of the tender and therefore such actual danger was actually known to the said crew for all of such distance; that nothing could be done by any member of the crew upon any one of the thirty-two cars that would materially check the movement of said train and all of the brakes on said locomotive engine had been applied at or near to the highway crossing, all of which was proximately produced by the failure to use and apply said stored air.

Plaintiff says that approximately by reason of said automobile in which she had been carried safely upon the front of said train for seven or eight hundred feet being forced under the wheels of said tender she was caused the following injuries: amputation of the right leg between the knee and hip; injuring the flesh, muscles, ligaments, bones and nerves of the left leg, tearing and bruising the flesh for many inches long and many inches wide; that by reason of such injuries said left leg in its use and functioning has been practically destroyed; that said injuries produced a shock to plaintiff's whole nervous system thereby producing traumatic neurasthenia.

Plaintiff says that all of her said injuries were directly and proximately produced through the negligence, carelessness and unlawful conduct of the defendant company in this, to wit:

First: In causing and permitting said collision, as aforesaid.

[fol. 18a] Second: In failing to give proper and sufficient warning of the approach of said train as provided by the statutory laws of the State of Ohio which were then in full force and effect.

Third: In causing plaintiff said injuries when the defendant, through its employees, actually knew of the great danger in which plaintiff was placed so that said defendant had ample time in the exercise of ordinary care to have prevented said injuries after they had such actual knowledge.

Fourth: In operating said train along said right of way, thirty-two cars in length, without coupling the air then stored in the locomotive engine so that it could be used in the train line for the purpose of immediately and instantly applying the brakes as aforesaid.

Fifth: In failing and neglecting to couple the train line and air hose before starting toward the place of the accident and in attempting to operate said train across the public highway as aforesaid without having sufficient mechanical ability to stop said train.

Sixth: In failing to obey the laws of the state and the United States which were then in full force and effect in reference to maintaining and the use of air in and on said cars of said train which would have supplied full force for the application of all the brakes as aforesaid.

Plaintiff says that by reason of said injuries she has suffered pain of mind and body and will continue to suffer in the future and that she has been made a cripple for life; that by reason thereof she has been damaged in the sum of One Hundred Thousand Dollars, for which, together with costs, judgment is asked.

Anderson & Lamb, Attorneys for Plaintiff.

[fol. 19a] *Duly sworn to by Mayme F. Meredith. Jurat omitted in printing.*

[fol. 19½a] [File endorsement omitted.]

[fol. 20a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

ORDER AS TO TIME—Filed June 27, 1930

The defendant is given leave to move or plead on or before July 5th, 1930.

W. S. Slocum, Judge of the Court of Common Pleas
Lake County, Ohio.

[fol. 20½a] [File endorsement omitted.]

[fol. 21a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

ANSWER TO AMENDED PETITION—Filed July 5, 1930

Now comes the defendant and for its answer herein says that it admits that it is a corporation operating a railroad in Ohio; that its line intersects at substantially right angles a public highway in Painesville Township, known as Hardy Road, and which runs in a general northerly and southerly direction, and which crosses defendant's railroad line at grade; that on July 19th, 1929, plaintiff was driving an automobile which was proceeding southerly on said highway, as it approached said crossing; that at or about the same time defendant's engine, pulling a string of cars, was approaching said crossing; that said engine and cars approached said grade crossing at about ten miles per hour; that said automobile was driven upon the tracks of defendant's railroad and collided with the tender of the locomotive engine; that the pilot of the engine was coupled on to the first of the cars which it was pulling, and that the tender first reached said crossing; that the engineer, fireman, and conductor were the persons named in the petition; that all of said cars were of standard construction and gauge, and complied with the Federal Laws; that the tender was moving about fen miles per hour at the time it collided with said automobile; that nothing could be done by any member of the crew upon any one of the cars that would materially check its movement, except the application of air which [fol. 22a] was applied to said locomotive engine and tender. That plaintiff received some injuries as the result of the accident, but not of the nature or to the extent alleged in the petition, and that she received hospital treatment.

Each and every allegation in the petition contained, not hereinbefore expressly admitted, is hereby denied.

Should the defendant be found to be guilty of negligence in any respect, which it expressly denies, the defendant avers that any injuries received by the plaintiff were the result of her own negligence contributing thereto.

Alvord, Blakely & Ostrander, Attorneys for Defendant.

[fol. 23a] *Duly sworn to by L. L. Dixon. Jurat omitted in printing.*

[fol. 23½a] [File endorsement omitted.]

[fol. 24a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

MOTION TO CONTINUE—Filed Nov. 10, 1930

Now comes the plaintiff by his counsel and asks for a continuance of said cause for this assignment for the reason that counsel for plaintiff will be engaged in the Federal Court at Youngstown, Ohio and will not be available for trial and plaintiff respectfully asks the consent of this Court to postpone the trial of this case until the next assignment.

Anderson & Lamb, Attorneys for Plaintiff.

Copy of the within motion mailed to Alvord, Blakely & Ostrander, National Bank Building, Painesville, Ohio, Attorneys for Defendant, this 7th day of November, 1930.

[fol. 24½a] [File endorsement omitted.]

[fol. 25a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

ORDER OF CONTINUANCE—Filed Nov. 10, 1930

This 8th day of November, 1930 this cause came on to be heard upon the motion of plaintiff to continue this case and it appearing to the Court that counsel for plaintiff will be engaged in the Federal Court at Youngstown, Ohio, it is hereby ordered that this case be continued.

W. S. Slocum, Judge.

[fol. 25½a] [File endorsement omitted.]

[fol. 26a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

JOURNAL ENTRY—Oct. 13, 1931

This day, to-wit October 13th, 1931, came the parties herein, by their attorneys; also came the following named persons as jurors, to-wit: Bertha Sherwood, Fred E. Rand, Arthur G. Stamm, William Gifford, Gertrude Drake, Mrs. C. M. Kopf, Thomas Barkley, Mrs. Hulda Schultz, W. Uransky, Fred Guthleben, E. B. Bartlett, F. B. Stearns, who were duly impaneled and sworn according to law; and thereupon the case came on for hearing on the pleadings and evidence.

And the hour of adjournment having arrived, the court discharged said jury until to-morrow morning at 9:15 o'clock.

Walter D. Jones, Judge.

[File endorsement omitted.]

[fol. 27a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

MOTION FOR DIRECTED VERDICT—Filed Oct. 14, 1931

Now comes the defendant at the close of plaintiff's testimony, and the plaintiff having rested, and moves the court to direct the jury to return a verdict for the defendant in this case.

Alvord, Blakely & Ostrander, & Harry T. Nolan,
Attorneys for Defendant.

[File endorsement omitted.]

[fol. 28a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

JOURNAL ENTRY—Oct. 14, 1931

This day to-wit, October 14th, 1931, again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn and the trial proceeded.

Thereupon on motion of the plaintiff, it is ordered that the jury be conducted in a body, in charge of the bailiff, to view the premises where said alleged accident occurred, and that the same be shown to them by said bailiff; and that they return to their seats at 1:15 o'clock.

Thereupon at the close of the plaintiff's testimony, the plaintiff having rested, the defendant moves the court to direct the jury to return a verdict for the defendant in this case; which motion was argued to the court in the absence of the jury. And the hour of adjournment having arrived, the court discharged said jury until tomorrow morning at 9:15 o'clock.

Walter D. Jones, Judge.

[File endorsement omitted.]

[fol. 29a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

JOURNAL ENTRY—Oct. 15, 1931.

This day to-wit, October 15th, 1931, again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn and the trial proceeded; the motion of defendant for a directed verdict having been overruled and exception noted.

And the hour of adjournment having arrived, the court discharged said jury until tomorow morning at 9:15 o'clock.

Walter D. Jones, Judge.

[File endorsement omitted.]

[fol. 30a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

MOTION FOR DIRECTED VERDICT—Filed Oct. 16, 1931

Now comes the defendant at the close of all the testimony herein and both parties having rested, and moves the court to direct the jury to return a verdict for the defendant.

Alvord, Blakely, & Ostrander, & Harry T. Nolan,
Attorneys for Defendant.

[fol. 30½a] [File endorsement omitted.]

[fol. 31a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

JOURNAL ENTRY—Oct. 16, 1931

This day to-wit, October 16th, 1931, again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded.

Thereupon at the close of all the testimony herein, both parties having rested, the defendant moves the court to direct the jury to return a verdict for the defendant; which motion was overruled and exception noted.

Thereupon counsel proceeded with their arguments and the hour of adjournment having arrived, the court discharged said jury until tomorrow morning at 9:15 o'clock.

Walter D. Jones, Judge.

[File endorsement omitted.]

[fol. 32a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

JOURNAL ENTRY—Oct. 17, 1931

This day to-wit, October 17th, 1931, again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn and the trial proceeded.

And the said jury having heard the remaining arguments and the charge of the court; and the hour of adjournment having arrived, the court discharged said jury until Monday morning at 9:15 o'clock.

Walter D. Jones, Judge.

[File endorsement omitted.]

[fol. 33a] IN COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO

[Title omitted]

VERDICT FOR PLAINTIFF—Filed Oct. 19, 1931

We the Jury, being duly impaneled and sworn, find the issues in this case in favor of the Plaintiff, and assess the amount due to the Plaintiff from the Defendant, the said The Fairport, Painesville & Eastern Railroad Company, at the sum of ($20,000) Twenty Thousand no/100 Dollars.

And we do so render our verdict upon the concurrence of 12 members of our said Jury, that being three-fourths or more of our number. Each of use said jurors concurring in said verdict signs his name hereto this 19th day of October, 1931.

1. E. B. Bartlett, 2. Bertha Sherwood, 3. Hulda M. Schultz, 4. Mary B. Kopf, 5. Gertrude Drake, 6. F. E. Rand, 7. T. Barkley, 8. Fred Guthblen, 9. William Gifford, 10. William Uransky, 11. Arthur G. Stamm, 12. F. B. Stearns.

[File endorsement omitted.]

[fol. 34a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Oct. 20, 1931

Now comes the defendant, The Fairport, Painesville & Eastern Railroad Company, and moves the court for a new trial in this case for the following reasons:

1. The court erred in overruling the motion of defendant made at the close of plaintiff's testimony, and after plaintiff had rested, to direct the jury to return a verdict for the defendant.

2. The court erred in overruling the motion of the defendant made at the close of all the testimony in the case, and after both sides had rested, to direct the jury to render a verdict for the defendant.

3. The court erred in admitting evidence offered by the plaintiff to which the defendant objected and excepted.

4. The court erred in excluding evidence offered by the defendant to which exclusion the defendant excepted.

[fol. 35a] 5. The court erred in giving to the jury before argument each of the charges requested by the plaintiff and given by the court.

6. The court erred in the general charge to the jury.

7. The verdict in this case is against and contrary to the evidence.

8. The verdict in this case is contrary to law.

9. The verdict is not sustained by sufficient evidence.

10. The verdict in this case is against the weight of the evidence.

11. The verdict is excessive and appears to have been given under the influence of passion and prejudice.

12. Newly discovered evidence, material for the defendant, which with reasonable diligence, it could not have discovered and produced at the trial.

13. Misconduct of the jury.

14. Misconduct of attorneys for the plaintiff.

15. Accident and/or surprise which ordinary prudence could not have guarded against.

16. Error of law occurring at the trial and excepted to by the plaintiff.

Alvord, Blakely & Ostrander & Harry T. Nolan,
Attorneys for Defendant.

[fol. 35½a] [File endorsement omitted.]

[fol. 36a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

REPLY—Filed Oct. 21, 1931

Now comes the plaintiff and for reply to the answer of the defendant filed herein, denies each and every allegation inconsistent with and in opposition to the allegations in her petition.

Wherefore, plaintiff prays as in her amended petition she has prayed.

Anderson & Lamb, Attorneys for Plaintiff.

Duly sworn to by Mayme F. Meredith. Jurat omitted in printing.

[fol. 36½a] [File endorsement omitted.]

[fol. 37a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

AFFIDAVIT OF GEORGE E. MATHER—Filed Nov. 21, 1931

George E. Mather being first duly sworn on oath says that he is the official court reporter of the Court of Common Pleas, Lake County, Ohio, and occupied such position at the time of the matters hereinafter stated; that he was present during the trial of the above named case and during the argument of counsel; that D. F. Anderson and Homer Marshman of the firm of Anderson and Lamb, Attorneys at Law, represented the plaintiff; that this affiant took the stenographic notes of the closing argument in the case made by said D. F. Anderson; that at the close of such argument the following statement was made by him:

"I am old and gray haired. I have been pretty active in the State and Federal courts for a great many years. I have had a good many cases against railroad companies and I am not ashamed of it. I have had an opportunity in my life several times to represent railroads. It is a mighty fine thing; it is a compliment to you to do it; but I have represented the individual; for years and years I have represented the individual in claims against railroad companies, or the administrators of people that were killed by the railroads; and in all that time, for thirty or forty years in the state and federal courts, no railroad man in any case ever testified that they did not ring the bell and blow the whistle. None of them, and I have seen thousands of witnesses—I have tried thousands of cases—and in no case in all my life have I ever heard any railroad man say that the signal was not given or the whistle sounded and bell rung for all the distance; so it was not a surprise to me at all that the crew testified in just that way."

[fol. 38a] Thereupon the following proceedings were had:

"Counsel for defendant excepted to the remarks of counsel for plaintiff.

Mr. Anderson: Please, if you make an objection make it to the court and let the court pass upon it. Don't sneak in an objection.

Mr. Blakely: I do object to counsel testifying to what he has done and what he has heard in a thousand other cases.

Mr. Anderson: I beg your pardon—it was wrong.

The Court: The jury will disregard the remarks of counsel entirely. It is immaterial what was testified in other cases."

Affiant further says that later in said argument the said D. F. Anderson made the following statement:

"Name me one solitary witness that says that any sand was used at all. It was not. A strong statement, isn't it? Would a careful, prudent engineer, under this evidence, have used sand? It was not used. The engineer has not testified here; he is dead. I don't know when he died; but before he died I took his deposition. It is in that record there. I stated in this case before—the girl's case—that I never had been asked for permission to file and use that deposition of the engineer. I said 'you can use it if you want to.' I said that in the other trial."

Thereupon the following proceedings were had:

"Mr. Blakely: I object, and I charge misconduct of counsel in saying that, for you know what you asked the engineer about sand in that deposition and what he responded.

Mr. Anderson: I would like to have had what the engineer said in.

The Court: Let us drop the subject of the deposition. I do not think it is proper in this case.

Mr. Anderson: I want to get it in.

Mr. Blakely: I want to object to that statement, especially from the fact that that deposition was not signed and is not capable of being introduced in evidence.

The Court: The jury will not consider what was said about the engineer's deposition. I do not permit it to go in at this stage of the case and you will not regard what is said about the deposition.

[fol. 39a] Mr. Anderson: You know that the Supreme Court has decided——

The Court: Are you continuing that subject after the warning I have given you? If you are, stop it at once."

And further affiant says not.

Geo. E. Mather.

Sworn to before me and signed in my presence this 21st day of November, 1931, at Painesville, Ohio. Ethel Nash, Notary Public. My commission expires Sept. 18, 1932. (Notarial seal Lake County, Ohio.)

[fol. 39½a] [File endorsement omitted.]

[fol. 40a] IN COURT OF COMMON PLEAS OF LAKE COUNTY

[Title omitted]

AFFIDAVIT OF ELBERT F. BLAKELY—Filed Nov. 21, 1931

Elbert F. Blakely being first duly sworn on oath says that on the date of the happening of the events hereinafter related, he was one of the attorneys for The Fairport, Painesville and Eastern Railroad Company, defendant herein; that on July 19, 1929, an accident occurred to the plaintiff herein for which this action was brought; that Lee Anna Meredith, daughter of the plaintiff, was injured in the same accident and brought suit against The Fairport, Painesville and Eastern Railroad Company, being Case Number 11252 in this court; that on the 10th day of January, 1930, said Lee Anna Meredith through her attorneys, Anderson & Lamb, and appearing by D. F. Anderson and Homer Marshman, took the deposition of Gilbert D. Austin who was the engineer having charge of the engine involved in said accident; that this affiant was present at the taking of said deposition as attorney for the defendant; that the said D. F. Anderson conducted said examination for the said Lee Anna Meredith and after inquiring of said engineer as to the circumstances surrounding the collision, asked said engineer the following question and received the following answer:

Question: "What did you do?"
Answer: "I applied my brakes at once and used sand."

That said deposition is the one referred to by said D. F. Anderson in his argument to the jury in this case.

Elbert F. Blakely.

Sworn to before me and signed in my presence this 21st day of November, 1931, at Painesville, Ohio. Dorothy G. Reed, Notary Public. (Notarial seal Lake County, Ohio.)

Tax fee.

[fol. 40½a] [File endorsement omitted.]

[fol. 41a] IN COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO

[Title omitted]

NOTICE OF FILING BILL OF EXCEPTIONS—Filed Feb. 12, 1932

You are hereby notified, that on this 8th day of February, 1932, The Fairport, Painesville & Eastern R. R. Co., the defendant in the above entitled case, filed a bill of exceptions to the finding which was made by the Court on the 19 day of Oct., 1932, in said case.

The law requires that any objection or amendment to the bill of exceptions must be filed in the cause within ten days after this notice, for its correction.

Witness my hand and the seal of said Court, this 9th day of Feb., 1932.

Elizabeth S. Murphy, Clerk. By — —, Deputy. (Seal Common Pleas Court, Lake County, Ohio.)

Date of Overruling or Decision: — —, 19—.
Forty days from same: — —, 19—.
Ten days from this notice: Feb. 19, 1932.

We, the undersigned, hereby acknowledge due service of the above notice.

Anderson & Lamb, by Homer Marshman.

[fol. 41½a] [File endorsement omitted.]

[fol. 42a] COURT OF APPEALS, FEBRUARY TERM, A. D. 1933

Mandate from Court of Appeals—In Error

Judgment Affirmed

General Code, Sec. 12274

THE STATE OF OHIO,
Lake County:

At a Term of the Court of Appeals, within and for said County, begun and held at Painesville, Ohio, on the 6th day of February, 1933, before Hon. J. W. Roberts, Presiding Judge, and Hon. Louis T. Farr, and Hon. John Pollock, Judges, among other proceedings then and there had by and before said Court, as appears by its Journal, is the following, to-wit:

No. 227

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY, Plaintiff in Error,

vs.

MAYME F. MEREDITH, Defendant in Error

Error from Common Pleas

Judgment affirmed.

The said parties appeared by their Attorneys, and this cause came on to be heard upon the Petition in Error of said The Fairport, Painesville & Eastern Railroad Company, Plaintiff in Error herein, together with the original papers and pleadings and a duly certified Transcript of the orders and Judgment of the Court of Common Pleas of Lake County, Ohio, filed therewith in the said cause wherein Mayme F. Meredith was Plaintiff and The Fairport, Painesville & Eastern Railroad Company was Defendant, mentioned and referred to in said Petition in Error, and was argued by counsel: Upon consideration whereof the Court finds that there is no Error manifest upon the face of the record in said orders and Judgment of said Court of Common Pleas; and in its opinion substantial justice has been done to the party complaining as shown by the record of the proceedings, and the judgment under review.

It is thereupon considered, ordered and adjudged by this court, that the Judgment and proceeding of the said Court of Common Pleas, in said decree in favor of the said Defendant in Error and against the said Plaintiff in Error, be and the same are hereby, in all things affirmed; there being however, in the opinion of the Court, reasonable ground for this proceeding in Error.

It is further considered and ordered, that the plaintiff in Error pay the costs of this proceeding in Error, taxed at $6.93, and in default thereof, that execution issue therefor.

This cause came on for hearing upon the petition in error. the transcript and original papers and pleadings from the Court of Common Pleas of Lake County, and was argued by counsel and submitted to the court; and, on consideration thereof, the court finds there is no error apparent on the record in said proceedings and judgment; and that in the opinion of the court substantial justice has been done the parties complaining as shown by the record of the proceedings and judgment under review.

It is therefore considered by the court that the judgment aforesaid be, and the same hereby is affirmed; and that the defendant in error recover from the plaintiff in error her costs herein expended, and the court being of the opinion that there was reasonable grounds for proceedings in error, no penalty is allowed.

It is further ordered that a special mandate be sent to the Common Pleas Court of Lake County, Ohio, to carry this judgment into effect.

To all of which finding and judgment of the court, the plaintiff in error excepts.

Approved.

Alvord, Blakely & Ostrander, Harry T. Nolan, Attorneys for Plaintiff in Error. Anderson & Lamb, Attorneys for Defendant in Error, per H. R. Marshman.

[fol. 43a] Ordered, that a Special Mandate be sent to the Court of Common Pleas, of Lake County, to carry this Judgment and decree into execution.

I, the undersigned Clerk of the Court of Appeals of Lake County, Ohio, do hereby certify that the foregoing Entry is truly taken and correctly copied from the Journal of said Court of Appeals.

Witness my hand and the seal of said Court of Painesville, Ohio, this 21st day of August, 1933.

Elizabeth S. Murphy, Clerk, by Ardis Beardsley, Deputy. (Seal Court of Appeals of Lake County, Ohio.)

COURT OF APPEALS

THE STATE OF OHIO,
Lake County.

To the Honorable Court of Common Pleas, Within and for the County of Lake, Ohio:

We hereby command you that you proceed without delay, to carry into execution the within and foregoing judgment of our Court of Appeals of Lake County in the case of The Fairport, Painesville & Eastern Railroad Company vs. Mayme F. Meredith, the Petition in Error herein and heretofore filed to the contrary notwithstanding.

Witness my signature as Clerk of our said Court of Appeals, and the seal thereof, this 21st day of August, 1933.

Elizabeth S. Murphy, Clerk, by Ardis Beardsley, Deputy. (Seal Court of Appeals of Lake County, Ohio.)

[Endorsed:] No. 227. Doc. 1. Page 227. Court of Appeals, Lake County, O. The Fairport, Painesville & Eastern Railroad Company vs. Mayme F. Meredith. Alvord, Blakely & Ostrander, H. T. Nolan, Plaintiff's Attorneys. Anderson & Lamb, Defendant's Attorney-. Special Mandate. Filed Common Pleas Court, Lake County, Ohio: Aug. 21, 1933. Elizabeth S. Murphy, Clerk.

[fol. 44a] IN COURT OF APPEALS OF LAKE COUNTY, OHIO

No. 227

THE FAIRPORT, PAINESVILLE AND EASTERN RAILROAD COMPANY, Plaintiff,

vs.

MAYME F. MEREDITH, Defendant

DOCKET AND JOURNAL ENTRIES

1932, Feb. 24. Bill of Exceptions, with Exhibits, filed.
1932, Feb. 24. Transcript of Docket & Journal Entries, together with original pleadings filed from Common Pleas Court.

1932, March 1. Petition in Error filed.

1932, March 3. Waiver of Summons in Error & Entry of Appearance, filed.

1932, March 10. Precipe filed, and Summons in error issued.

1932, March 10. Motion filed.

1932, March 10. J. E. filed: Motion granted; plaintiff in Error given leave to file brief by May 1st, 1932. Jr. 1—Pg. 232.

1932, March 14, Summons in error returned endorsed as follows:

Serv. & Ret.	.75
Mileage	.48
Total	$1.23

(Lake Co.) Received this Writ March 10th, 1932 at — o'clock — M., and pursuant to its command on the 10th day of March, 1932, I served the within named Mayme F. Meredith by personally handing to her a true and certified copy of this writ with all the endorsements thereon. James Moloney, Sheriff, By Arthur S. Rand, Deputy.

1932, April 30. Brief of Plaintiff in Error Filed. (In Triplicate.)

1932, April 30. Acknowledgment of Service of Brief filed.

1932, May 10. Motion of deft. in error to extend time of filing brief.

1932, May 10. J. E. filed: Granting motion of deft. Jr. 1—Pg. 233.

1932, June 14. Motion filed.

1932, June 14. J. E. filed; Deft. to file brief by July 1st. Jr. 1—Pg. 234.

1932, June 24. Brief of defendant in Error filed. (In triplicate.)

1932, June 24. Proof of Service of Brief, filed.

1932, July 5. Motion, filed.

1932, July 5. J. E. filed: Pltf. given leave to file reply brief by August 1, 1932. Jr. 1—Pg. 234.

1932, July 29. Motion of Plff. for extension of time to file brief by Aug. 15, filed.

1932, July 29. J. E. filed: Motion granted. Plff. to file brief by Aug. 15. Jr. 1—Pg. 235.

1932, Aug. 15. Brief of Plaintiff in Error, filed. (In triplicate.)

1933, March 18. Supplemental Brief of Defendants in Error, filed. (In triplicate.)

1933, July 28. Opinion of Court of Appeals, filed.

1933, Aug. 19. This day being a day in the February Term of Court, the following proceedings were had herein, to-wit:

This cause came on for hearing upon the petition in error, the transcript and original papers and pleadings from the Court of Common Pleas of Lake County, and was argued by counsel and submitted to the court; and, on consideration thereof, the court finds there is no error apparent on the record in said proceedings and judgment; and that in the opinion of the court substantial justice has been done the parties complaining as shown by the record of the proceedings and judgment under review.

It is therefore considered by the court that [fol. 45a] the judgment aforesaid be, and the same hereby is affirmed; and that the defendant in error recover from the plaintiff in error her costs herein expended, and the court being of the opinion that there was reasonable grounds for proceedings in error, no penalty is allowed.

It is further ordered that a special mandate be sent to the Common Pleas Court of Lake County, Ohio, to carry this judgment into effect.

To all of which finding and judgment of the court, the plaintiff in error excepts.

—— ——, Judges of the Court of Appeals, Lake County, Ohio.

Approved: Alvord, Blakely & Ostrander, Harry T. Nolan, Attorneys for Plaintiff in error. Anderson & Lamb, per H. R. Marshall, Attorneys for Defendant in error.

1932, Aug. 21. Mandate issued to Common Pleas Court.

1933, Dec. 7. Certified Copy of Entry on Motion to Certify Record to Supreme Court overruling Motion, filed.

1934, Jan. 29. Affidavit, filed.

1934, Jan. 29. Application of F. P. & E. R. R. Co. to stay Execution, filed

1934, Jan. 29. Brief in Support of Application, filed.

1934, Feb. 1. Notice, with acknowledgment, filed.

1934, Feb. 5. This day being a day in the February Term of Court, the following proceedings were had herein, to-wit:

Upon application of The Fairport, Painesville & Eastern Railroad Company, Plaintiff in Error in the above entitled cause by E. F. Blakely its counsel, for a stay of execution of the judgment of the Court of Appeals of Ohio, Fourth District, sitting by assignment in the Seventh district, to enable said plaintiff in error to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and good cause therefor being shown it is ordered that the execution and enforcement of the said judgment be and is hereby stayed until the 25th day of February, 1934, to enable said plaintiff in error to apply for and obtain a writ of certiorari from the Supreme Court of the United States on condition that the said plaintiff in error gives good and sufficient security in the sum of $45,000.00, to be approved by the Clerk of Courts of Lake County, conditioned that if the said plaintiff in error fails to make application for such writ of certiorari within the time limited therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the said Defendant in Error, Mayme F. Meredith may sustain by reason of said stay. Feb. 3d, 1934. Peter J. Blosser, Presiding Judge. In the Court of Appeals, Seventh Judicial District of Ohio.

1934, Feb. 13. Undertaking in Error to Supreme Court of United States, filed.

[fol. 46a] IN COURT OF APPEALS OF OHIO

[Title omitted]

PETITION IN ERROR—Filed March 1, 1932

Now comes The Fairport, Painesville & Eastern Railroad Company, plaintiff-in-error, and says that at the January 1932 Term of the Common Pleas Court of Lake County, Ohio, the defendant-in-error, Mayme F. Meredith, recovered a judgment by consideration of said court against the plaintiff-in-error in an action therein pending, wherein plaintiff-in-error was defendant and the defendant-in-error was plaintiff.

A transcript of the docket and journal entries and all proceedings therein, together with all original pleadings and papers in said case are filed herewith.

The plaintiff-in-error avers that there is error in said record and proceedings to its prejudice in this, to-wit:

1. The court erred in admitting evidence offered by the plaintiff to which the defendant objected and excepted.

2. The court erred in excluding evidence offered by the defendant to which the defendant excepted.

3. The court erred in overruling the motion of defendant made at the close of plaintiff's testimony, and after plaintiff had rested, to direct the jury to return a verdict for the defendant, to which the defendant at the time excepted.

[fol. 47a] 4. The court erred in overruling the motion of the defendant made at the close of all of the testimony in the case, and after both sides had rested, to direct the jury to render a verdict for the defendant, to which the defendant at the time excepted.

5. The court erred in giving to the jury before argument each of the charges requested by the plaintiff and given by the court, to which the defendant at the time excepted.

6. The court erred in the general charge to the jury, to which the defendant at the time excepted.

7. The verdict in this case is against and contrary to the evidence.

8. The verdict in this case is contrary to law.

9. The verdict is not sustained by sufficient evidence.

10. The verdict in this case is against the weight of the evidence.

11. The verdict is excessive and appears to have been given under the influence of passion and prejudice.

12. The court erred in overruling the motion of defendant for a new trial, to which the defendant at the time excepted.

13. Misconduct of attorneys for the plaintiff.

14. Other errors apparent upon the record, and excepted to by the defendant.

Wherefore, plaintiff-in-error prays that said judgment may be reversed and that the plaintiff-in-error be restored to all things that it lost by reason thereby.

Alvard, Blakely & Ostrander and Harry T. Nolan,
Attorneys for Plaintiff-in-Error.

[fol. 47½a] [File endorsement omitted.]

[fol. 48a] In Court of Appeals of Ohio

[Title omitted]

Waiver of Summons-in-Error and Entry of Appearance—Filed March 3, 1932

The defendant-in-error hereby waives the issuance of summons-in-error on the petition in error filed in the Court of Appeals of Lake County, Ohio, in this case, and voluntarily enters her appearance herein, this 1st day of March, 1932.

Anderson & Lamb, Attorneys for Defendant-in-Error.

[fol. 48½a] [File endorsement omitted.]

[fol. 49a] IN COURT OF APPEALS OF OHIO

[Title omitted.]

PRECIPE FOR SUMMONS—Filed March 10, 1932

To the Clerk:

Issue summons-in-error on the petition-in-error filed herein directed to the Sheriff of Lake County for the defendant-in-error, Mayme F. Meredith, returnable according to law. Endorse same "Action praying for the reversal of the judgment which said defendant-in-error (plaintiff below) obtained against said plaintiff-in-error (defendant below) at the January 1932 Term of the Court of Common Pleas of said Lake County in case No. 11484 pending therein."

Harry T. Nolan and Alvord, Blakely & Ostrander, Attorneys for Plaintiff-in-Error.

[fol. 49½a] [File endorsement omitted.]

[fol. 50a] IN COURT OF APPEALS OF OHIO

In Error by Common Pleas

General Code, Secs. 12259, 60

Court of Appeals

SUMMONS AND RETURN—Filed March 14, 1932

The State of Ohio, Lake County, to the Sheriff of Lake County:

You are hereby commanded to notify Mayme F. Meredith, Painesville, Ohio, Defendant in Error, that The Fairport, Painesville & Eastern Railroad Company, plaintiff in error, has filed a petition in the office of the Clerk of the Court of Appeals of Lake County, and State of Ohio, asking the reversal of a judgment which said defendant in error obtained against said plaintiff in error, at the January term of the Court of Common Pleas, A. D. 1932, of said Lake County; and that said defendant in error must answer on or before the 29th day of August, 1932, the day upon which the next term of said Court of Appeals commences,[1] or said judgment may be reversed.

Said Sheriff will make due return of this summons on or before 29th day of August, 1932,[2] the first day of the next term of said Court of Appeals.

Witness my hand and the seal of said Court of Appeals, at Painesville, Ohio, this 10th day of March, 1932.

Elizabeth S. Murphy, Clerk, by Cynthia Wadsworth, Deputy. (Seal Court of Appeals, Lake County, Ohio.)

Sheriff's Return

THE STATE OF OHIO,
Lake County: :

Received this Writ March 10th, 1932, at — o'clock — M., and pursuant to its command on the 10th day of March, 1932, I served the within named Mayme F. Meredith by personally handing to her a true and certified copy of this writ with all the endorsements thereon.

Sheriff Fees

Service & Return, first name .	$ .75
Additional names at 25c.	
Mileage, 6 mi. at 8c.	.48
Total .	$1.23

James Moloney, Sheriff; Arthur S. Rand, Deputy.

[File endorsement omitted.]

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[1] If not so, erase the words, "next term of said Court commences," and write the words "said petition will be heard."

[2] If not so, erase the words following.

[fol. 51a] IN COURT OF APPEALS OF OHIO

[Title omitted]

MOTION FOR ORDER EXTENDING TIME—Filed March 10, 1932

Now comes The Fairport, Painesville & Eastern Railroad Company, plaintiff in error, and moves the court for an order extending the time to May 1st, 1932, within which plaintiff in error is to file its brief in this case.

Alvord, Blakely & Ostrander, Harry T. Nolan, Attorneys for Plaintiff in Error.

[fol. 51½a] [File endorsement omitted.]

[fol. 52a] IN COURT OF APPEALS OF OHIO

[Title omitted]

ORDER EXTENDING TIME—Filed March 10, 1932

On motion of the plaintiff in error for good cause shown, it is ordered that the time within which said plaintiff in error shall file its brief in this case be, and the same hereby is, extended to May 1st, 1932.

J. W. Roberts, Presiding Judge.

[File endorsement omitted.]

[fol. 53a] IN COURT OF APPEALS OF OHIO

[Title omitted]

MOTION FOR ORDEER EXTENDING TIME—Filed May 10, 1932

Now comes the defendant in error, Mayme F. Meredith, by her attorneys of record, Anderson & Lamb, and moves the court for an order extending the time to June 20th, 1932, within which defendant in error is to file her brief in this case.

Anderson & Lamb, Attorneys for Defendant in Error.

Receipt of copy of the within motion is hereby acknowledged this 7 day of May, A. D. 1932:

Alvord, Blakely and Ostrander, Attorneys for Plaintiff in Error.

[fol. 53½a] [File endorsement omitted.]

[fol. 54a] IN COURT OF APPEALS OF OHIO

[Title omitted]

ORDER EXTENDING TIME—Filed May 10, 1932

On motion of the defendant in error for good cause shown, it is ordered that the time within which said defendant in error shall file her brief in this case be, and the same hereby is, extended to June 20th, 1932.

J. W. Roberts, Presiding Judge.

[fol. 54½a] [File endorsement omitted.]

[fol. 55a] IN COURT OF APPEALS OF OHIO

[Title omitted]

MOTION FOR ORDER EXTENDING TIME—Filed June 14, 1932

Now comes the defendant in error, Mayme F. Meredith, by Anderson & Lamb, her attorneys of record, and moves the court for an order extending the time to July 1st, 1932, within which defendant in error is to file her brief in this case.

Anderson & Lamb, Attorneys for Defendant in Error.

[fol. 55½a] [File endorsement omitted.]

[fol. 56a] IN COURT OF APPEALS OF OHIO

[Title omitted]

ORDER EXTENDING TIME—Filed June 14, 1932

On motion of the defendant in error for good cause shown, it is ordered that the time within which said defendant in error shall file her brief in this case be, and the same hereby is, extended to July 1st, 1932.

J. W. Roberts, Presiding Judge.

O. K. Alvord, Blakely & Ostrander, for Plaintiff in Error.

[fol. 56½a] [File endorsement omitted.]

[fol. 57a] IN COURT OF APPEALS OF OHIO

[Title omitted]

MOTION FOR ORDER EXTENDING TIME—Filed July 5, 1932

Now comes the plaintiff-in-error herein and moves the court to extend the time for the filing of a reply brief herein until August 1st, 1932.

Alvord, Blakely & Ostrander, Attorneys for Plaintiff-in-Error.

[fol. 57½a] [File endorsement omitted.]

[fol. 58a] IN COURT OF APPEALS OF OHIO

[Title omitted]

ORDER EXTENDING TIME—Filed July 5, 1932

The time for filing reply brief on the part of the plaintiff-in-error is extended to August 1st, 1932.

—— ——, Judge.

Approved:

Alvord, Blakely & Ostrander, Attorneys for Plaintiff-in-Error. Anderson & Lamb, E. F. B., Attorneys for Defendant-in-Error.

[fol. 58½a] [File endorsement omitted.]

[fol. 59a] IN COURT OF APPEALS OF OHIO

[Title omitted]

MOTION FOR ORDER EXTENDING TIME—Filed July 29, 1932

Now comes the plaintiff-in-error, and moves the court for an order extending the time to August 15th, 1932, within which plaintiff-in-error may file its reply brief in this case.

Alvord, Blakely & Ostrander, Attorneys for Plaintiff-in-Error.

[fol. 59½a] [File endorsement omitted.]

[fol. 60a] IN COURT OF APPEALS OF OHIO

[Title omitted]

ORDER EXTENDING TIME—Filed July 29, 1932

On motion of the plaintiff-in-error, and for good cause shown, it is ordered that the time within which the plaintiff-in error may file its reply brief in this case is extended to August 15th, 1932.

—— ——, Presiding Judge.

Approved:

Anderson & Lamb, Attorneys for Defendant-in-Error. H. F. Nolan & Alvord, Blakely & Ostrander, Attorneys for Plaintiff-in-Error.

[fol. 60½a] [File endorsement omitted.]

[fols. 61a-73a] Opinion omitted, printed side page 488, infra.

[fol. 74a] IN SUPREME COURT OF OHIO, OF THE TERM OF JANUARY, A. D. 1933

No. 24377

THE FAIRPORT, PAINESVILLE AND EASTERN RAILROAD CO.

vs.

MAYME F. MEREDITH

ORDER OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF LAKE COUNTY TO CERTIFY ITS RECORD—November 29, 1933

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Clerk's Certificate to foregoing paper omitted in printing.

[Stamp:] Filed Court of Appeals, Dec. 7, 1933. Elizabeth S. Murphy, Lake County Clerk.

[fol. 75a] IN COURT OF APPEALS, SEVENTH JUDICIAL DISTRICT OF OHIO, LAKE COUNTY

NOTICE OF APPLICATION FOR STAY OF EXECUTION—Filed Feb. 1, 1934

To Messrs. Anderson & Lamb, Counsel for Defendant in Error:

You are hereby notified that the Plaintiff in Error herein has this day filed its application in the above entitled cause for an order granting a stay of execution to such time as is allowed by law for the filing of a petition in the Supreme Court of the United States for a writ of certiorari. The hearing on this application will be before the Honorable Peter J. Blosser, Judge of said court, at Court House, Chillicothe, Ohio, on the 3rd day of February, 1934, at 10 o'clock A. M.

Alvord, Blakely & Ostrander, Harry T. Nolan, Counsel for Plaintiff in Error.

The foregoing notice is hereby acknowledged, as is the receipt of copies of the Application, Affidavit and Brief.

D. F. Anderson, Attorneys for Defendant in Error.

[fol. 75½a] [File endorsement omitted.]

[fol. 76a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 77a] [File endorsement omitted.]

[fol. 1] IN COURT OF COMMON PLEAS OF LAKE COUNTY

No. 11484

MAYME F. MEREDITH, Plaintiff,

vs.

THE FAIRPORT, PAINESVILLE AND EASTERN RAILROAD COMPANY, Defendant.

Defendant's Bill of Exceptions—Filed Feb. 19, 1932

Appearances:

On behalf of Plaintiff, David F. Anderson, Esq., and Homer H. Marshman, Esq., of the firm of Anderson & Lamb.

On behalf of Defendant, Elbert F. Blakely, Esq., of the firm of Alvord, Blakely & Ostrander, and Harry T. Nolan, Esq.

Be it remembered, That at the September, 1931, Term of said court said cause came on for trial and was tried before Honorable Walter D. Jones, acting judge of said court, and a jury.

Whereupon, a jury having been duly impaneled and sworn, the following proceedings were had, to-wit:

David F. Anderson, Esq., of counsel for the plaintiff stated the case to the jury on behalf of plaintiff, and Elbert F. Blakely, Esquire, of counsel for defendant, on behalf of the defendant; whereupon the plaintiff to maintain the issues on her behalf introduced the following evidence:

[fol. 2] This Bill of Exceptions consists of two parts: Part one (1) contains a transcript of all the oral evidence and proceedings on the trial of said cause; Part two (2) is an envelope containing the blueprints, photographs, tracing and other exhibits introduced in evidence on said trial—said Part 2 being attached to Part 1 by a cord, and this Bill of Exceptions is to be delivered to the Clerk of Courts for filing in that condition.

[fol. 3] OFFERS IN EVIDENCE

Thereupon counsel for plaintiff introduced in evidence the following Exhibits and made statements to the jury respecting said exhibits as follows:

Mr. Anderson: Here is a photograph taken on July 22nd, 1929, which shows the railroad track looking up in the direction from which the train came. On the left it shows the orchard and it shows the heights. I introduce it here.

Said photograph was admitted in evidence and the same is hereto attached, marked "Plaintiff's Exhibit B" and made part hereof.

Mr. Anderson: I offer in evidence "Plaintiff's Exhibit 4". It is a picture that was taken October 5, 1931. The camera was back on the highway 335 feet from the track. The automobile that Mrs. Meredith was driving was going away from you in that picture. You can see the grade crossing out there. It shows the orchard on the left. The other shows along the railroad, this shows the orchard along the highway.

Said photograph was admitted in evidence and the same is hereto attached, marked "Plaintiff's Exhibit 4" and made part hereof.

Mr. Anderson: This is Plaintiff's Exhibit 5. This was taken on the day of the accident, July 19, 1929, shortly after the accident. It shows the railroad, the highway and the orchard, and I offer it in evidence.

Said photograph was admitted in evidence and the same is hereto attached marked "Plaintiff's Exhibit 5" and made part hereof.

[fol. 4] Mr. Anderson: This is Plaintiff's Exhibit 3. This shows the eye of the camera looking down between two rows of the apple orchard. I offer it in evidence.

Said photograph was admitted in evidence and is hereto attached, marked "Plaintiff's Exhibit 3" and made part hereof.

Mr. Anderson: Here is Plaintiff's Exhibit 2, taken July 19, 1929, at 5:15 P. M., after the accident. It shows the condition of the Packard car at the time after it was struck. I offer it in evidence.

Said photograph was admitted in evidence and is hereto attached, marked "Plaintiff's Exhibit 2" and made part hereof.

Mr. Anderson: Plaintiff's Exhibit 7 is a statement of the number of each car of the 32 in the train, showing whether they are loaded or empty. It is offered in evidence.

By agreement of counsel a copy of said statement may be substituted for the original and the same was admitted in evidence and said copy is hereto attached, marked "Plaintiff's Exhibit 7" and made part hereof.

Mr. Anderson: I offer Plaintiff's Exhibit 8, which is a map of the railroad.

Said map was admitted in evidence and is hereto attached, marked "Plaintiff's Exhibit 8" and made part hereof.

[fol. 5] J. H. MAINEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Will you give us your full name, please?
A. J. H. Mainey.
Q. Where do you live?
A. 20 Park Place, Painesville.
Q. What is your business?
A. Civil engineer and surveyor.
Q. For how long a time have you followed that profession?
A. Fifteen years.
Q. At the instance of Mr. Meredith did you make a map covering the physical situation at the Hardy Avenue crossing of the F. P. & E. Railroad?
A. Yes, sir.
Q. I ask you if this is the map that I have put here on the board?
A. It is.
Q. It is marked for identification "Plaintiff's Exhibit 1". I will ask you if this map is drawn to a scale?
A. Yes sir.
Q. And what scale?
A. One inch equals 10 feet.

Q. Would you mind stepping over here and pointing out the various things that I inquire of you about. Will you point out to us with your pencil the crossing itself, where [fol. 6] it crosses Hardy Road?

A. Right at this point (indicating).

Q. What kind of a road is that?

A. It is concrete pavement.

Q. What width?

A. 18 feet.

Q. What do you describe to the immediate left, or to the east of the Hardy Avenue crossing, approaching the crossing from the north? State what the descriptions of those pencil marks are?

A. Those are apple trees.

Q. What direction are they with reference to the approach from the north, east or west?

A. They are northeast in direction.

Q. Which direction is north and which is south on your map?

A. The top of the map is north and the bottom is south.

Q. And the left is west and to the right is east?

A. Yes sir.

Q. I see here to the west of the crossing that you have certain marks along the railroad itself. Will you tell us what those are?

A. They indicate ties.

Q. And what you have shown here, are those all of the ties?

A. No; those are new ties.

Q. What do you mean by new ties?

[fol. 7] A. Those that are clearly new.

Q. When did you get the information for that map?

A. September 25th, 1929.

Q. You understood the accident to have been about two months before that?

A. Yes sir.

Q. Going to the west can you tell us substantially how many there were of them?

A. Seventy-one.

Q. When you got the data were there any markings to give you that information?

A. There was a green mark on the base of the rail above each tie.

Q. You have the words "Old tie 657 feet from Hardy Road". What do you mean by "old tie"?

A. There is an old tie that is deformed.

Q. In what respect deformed?

A. The center of the tie was higher than a straight line or normal tie would be.

Q. I see, you have certain indications in your map, one of which is marked "X"—what does that portray?

A. That is a cross-section showing that old tie.

Q. You have to the immediate left a drawing called "Y". What does that portray?

A. That shows the intersection of the Hardy Road and the railroad on a smaller scale, taking in more territory.

Q. And in this section of the map what are those?

[fol. 8] Q. I see you have marked immediately west of the crossing a colored or a fine line on the ties, marked "first disfigured tie"—how far is that from the crossing?

A. 31 feet from the west edge of the pavement.

Q. You show a cross arm sign immediately to the north of the crossing and to the west of the road itself. Can you tell us how far the railroad crossing sign, cross arm sign, was from the north rail?

A. Twenty-seven feet.

Q. What was the description of that—what is your recollection of just what that looked like?

A. "Railroad crossing."

Q. Wood or iron?

A. It was wood.

Q. You have a marking directly east of the crossing; what does that indicate?

A. The elevation of the rail.

Q. What is that elevation of that?

A. 100.16.

Q. As you approach the crossing to the east state whether or not there is a grade, down or up hill?

A. It is down grade.

Q. What is the down grade?

A. 18 per cent—2¼ inches per hundred feet.

Q. If I understand you correctly, 2¼ inches per hundred feet?

A. Yes sir.

Q. What is the grade directly west of the crossing?

A. .43 per cent. That would mean 5⅛ inches per 100 [fol. 9] feet?

Q. You have a wire fence on there, situated on the railroad tracks on the west side and you have not on the east side?

A. No sir.

Q. No fences at all.

A. No sir.

Q. What do you mean by a concrete culvert directly south of the crossing?

A. A concrete block culvert carrying drainage water under the pavement.

Cross-examination.

By Mr. Blakely:

Q. Mr. Mainey, there was a railroad sign, according to your measurement, 27 feet north of the rail?

A. Yes sir.

Q. That sign was not the same sign at the time of the accident as it is at the present time, is it?

A. What is that question?

Q. Is that the same sign that you show here, on the date of the accident, that exists at the present time?

A. No.

Q. At the date of the accident an ordinary railroad sign post was there, with cross arms, with the warning, "Railroad Crossing"?

A. Yes sir.

Q. And in the last six months or so there has been a blinker sign put there, has there not?

[fol. 10] A. There is one there at present.

Q. And that is nearer the tracks than the old sign, is it not?

A. Yes sir.

Q. I note over here on this little inside map—this shows this same crossing on a smaller scale?

A. Yes sir.

Q. I notice on that map it shows the apple orchard as if it was one continuous tree. That is not so as a matter of fact, is it?

A. No sir.

Q. This larger picture over here shows the true situation which existed at the time of the accident in regard to the orchard?

A. Yes sir.

Q. What is the width of that right of way as shown between those two fences on the west side of the highway crossing?

A. Approximately 50 feet.

Q. Do you know as a matter of fact that on the east side of this highway crossing that the right of way was 60 feet in width?

A. According to the record.

Q. The right of way over here is ten feet wider on this east side of the highway—I am speaking of the road bed of the railroad—is ten feet wider than it is on the west side?

[fol. 11] A. Yes sir.

Q. Did you show only the west side because there was no fence over on the other side?

A. No sir.

Q. You were fixing this by the fence line?

A. Yes sir.

Q. Now, you have shown everything in the vicinity of this crossing—in the close vicinity of this crossing—as I take it, that was there at the time of the accident?

A. Yes.

Q. What time did you map this?

A. September 25h, 1929.

Q. That was a couple of months after the accident. There had not been any change at that time that you knew of?

A. Not as I know of.

Q. There was no indication of change there at that time was there?

A. I did not pay strict attention to that.

Q. You did not notice any?

A. No sir.

Q. You have a mark in the center of the highway—a mark in the center of the highway—an arrow pointing to the south. How far distant is that point from the north line of the railroad track?

A. 52 feet from the north rail.

Q. Going down the pavement, approaching from the north [fol. 12] that point is 52 feet from that north rail of that track?

A. Yes sir.

Q. Now, you were shown a line, I have noticed over here, running diagonally towards the east, and at an angle of approximately 45?

A. Yes sir.

Q. That line was designed to show the line of division, was it not?

A. Yes sir.

Q. From the center of the highway, 52 feet north of the north rail over to the railroad tracks, is that so?

A. Correct.

Q. And running the line past the last tree which interferes with the view as you approach from the north, is that right?

A. Yes sir.

Q. And that line clears that tree by how far?

A. One foot.

Q. Take this point in the north line of the railroad track, where this line strikes it, how far is that from the center of the pavement at the highway crossing?

A. It was 52 feet.

Q. That point is the same distance away from the center of that crossing as this point in the highway is from the north of the north rail?

A. Yes sir.

Q. Now, take your ruler, if you please—what do you call [fol. 13] that?

A. A scale.

Q. Take your scale and take a point 40 feet from the north rail in the center of the pavement of the highway, and draw a similar line down to the railroad track, and state how far that would be from the center of the crossing.

A. 78 feet.

Q. It is approximately 78 or 79, is that right?

A. Yes sir.

Q. So that when a traveler on the highway, assuming that they were either on the center line of the road or west of the center line of the road—that is, that they were on their own right hand side of the road—approached this railroad crossing from the north, their line of vision was entirely unobstructed when they arrived at 40 feet from the north rail of the railroad track, down the tracks, a distance of approximately 78 or 79 feet?

A. Yes sir.

Q. Find a point 75 feet from this north rail in the highway—you might as well go a little further and make it 80—Take a point 80 feet back in the center of the highway and to the north of the railroad tracks, and by extending a line along the line of vision past this last apple tree, it would strike the railroad rail at what point east of the center of the highway?

[fol. 14] A. Thirty-eight feet.

Q. So that from a point 80 feet back here there was an unobstructed view clear down across the railroad at a distance of 38 feet from the center of the crossing?

A. Yes sir.

Q. Take a point in the center of the pavement 110 feet north of the north rail and extending a line diagonally at an angle, so as to pass the last apple tree, where would that strike the railroad tracks—where would it strike the line of the railroad?

A. 32 feet east.

Q. East of the center?

A. Yes.

Q. Were those apple trees drawn to scale?

A. Yes sir.

Q. And that shows then correctly the size of the apple trees at the time of the accident—I mean in September 25th, 1929, about two months after the accident?

A. Yes sir.

Q. Now, at this last distance which you have measured for me, and in all of these other distances which I have named on the railroad line, and beginning at 110 feet north and approaching the railroad line, the line of vision was clear and unobstructed at the points that you have mentioned at the distances respectively that you have mentioned east of the center of the crossing?

A. Yes sir.

[fol. 15] Q. You have spoken about a tie being larger than the others. What is the ordinary height of a tie above the ballast, do you know?

A. The tie above the ballast?

Q. Yes.

A. Usually a couple of inches.

Q. All right, how high was this now?

A. Above the ballast?

Q. Yes.

A. That I don't know.

Q. Ties are generally quite irregular, are they not?

A. Some are and some are not.

Q. These ties mostly were hewn ties, were they not?

A. I think they were.

Q. They are always more or less irregular, are they not?

A. Yes; they would be.

Redirect examination:

Q. Mr. Mainey, since you drew this map to scale, of course you had to go in this orchard to get your measurements, didn't you?

A. Yes sir.

Q. And you have stated that this is the vision line—52 feet?

A. Yes sir.

Q. As you walked out that time in September, 1929—as you walked towards the crossing from the north—state whether or not you saw the rails of the tracks to the east, [fol. 16] and if not, why not?

A. While I was walking, I could not see them. If I stood still I could see the track in places.

Q. If you stood still, at places you could see the track?

A. Yes sir.

Q. If you walked you could not?

A. That is right.

Q. Why couldn't you see it—what prevented it?

A. Because of the staggered position of the trees.

Q. Because of the staggered position of the trees as you walked along towards the crossing?

A. Yes sir.

Q. Is this smaller one a true perspective?

A. No one of them is a perspective. They are plains.

Q. This being to a much smaller scale you could not depict the trees themselves, you just bunched them?

A. Yes sir.

Recross-examination:

Q. In regard to seeing the rails in answer to the question on redirect examination, you were speaking of seeing the rail*d* down through the orchard, were you not?

A. Looking through the orchard, yes sir.

Q. You were not speaking of the rails in view out there along the line of vision that you have described to me?

A. No.

Q. You say you could not see the rails at that time down [fol. 17] through the orchard?

A. From a standstill, no sir."

Mr. Marshman: We offer the map in evidence, your Honor.

Mr. Blakely: No objections.

The Court: It is admitted.

Said map last above referred to is hereto attached, marked "Plaintiff's Exhibit 1" and made part of this Bill of Exceptions.

[fol. 18] **H. B. Hurst**, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Will you give us your name, please?

A. H. B. Hurst.

Q. You live here in Painesville?

A. 414 Meadow Lane, Painesville.

Q. How long have you lived here?

A. About nine years.

Q. What is your business?

A. Printer.

Q. Are you somewhat of an amateur photographer?

A. Yes sir.

Q. After the accident at the Hardy Avenue crossing at which the Merediths were injured did you take some photographs?

A. I did.

Q. I ask you if that is one that was taken after the accident?

A. That was taken after the accident, yes sir.

Q. These other photographs were taken and one or two at least were enlarged at Mr. Meredith's request?

A. Yes sir.

Q. And they are marked on the back the time that they were taken?

A. Yes sir, mine are.

Q. The ones that you took were marked on the back, weren't they?

[fol. 19] A. Yes sir.

Cross-examination.

By Mr. Nolan:

Q. For what purpose did you take them?

A. I took them for the newspaper at the time of the accident.

Q. Were they published in the newspaper?

A. Some of them were.

Q. Did you deliver them to somebody else also?

A. I gave Mr. Meredith a set of them.

Q. You are a friend of Mr. Meredith?

A. Yes, sir.

[fol. 20] A. K. Nevanpera, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Will you give us your full name, please?

A. A. K. Nevanpera.

Q. Where do you live?

A. In Painesville township, over here on the Fairport-Nursery Road.

Q. How long have you lived here in Painesville?

A. Close on forty years.

Q. Do you have a farm in the neighborhood of the Hardy Avenue crossing?

A. Yes sir.

Q. How close to that crossing is that farm?

A. Part of my farm adjoins this crossing on the railroad.

Q. It adjoins the crossing itself, is that right?

A. Yes.

Q. In what direction from the crossing itself is your farm?

A. It is south-west.

Q. Mr. Nevanpera, do you recall the time that the Meredith car was struck by an F. P. & E. engine?

A. Yes, sir.

Q. That was in the summertime of 1929, wasn't it—July 19th, 1929?

A. I don't get that.

Q. Would the time of that accident be about July 19th, 1929?

[fol. 21] A. Yes sir.

Q. About what time in the day?

A. Between three and four o'clock.

Q. Where were you at the time of this accident?

A. I was on top of a stack of hay.

Q. On top of a hay-stack, and about how far from the crossing itself?

A. About eight hundred feet or so—I can't say exactly.

Q. Could you see the crossing from where you were standing?

A. Yes sir.

Q. What called your attention to the fact that there had been an accident—what did you hear or see, or learn?

A. The crash when they came together and the screams of these people in the automobile.

Q. Immediately before that state whether or not you heard the ringing of a bell or blowing of a whistle?

A. It did not come to my notice.

Q. After you heard the crash indicating that there had been some accident and the screaming of the women what did you do?

A. We did not do anything at all until the train came to a stop.

Q. Where did the train come to a stop with reference to the crossing?

A. Several hundred feet. I don't know exactly, I never measured it.

Q. Did it stop west or east of the crossing?

A. West.

[fol. 22] Q. Which direction was the train going?

A. Going west.

Q. Did you see the train pushing the automobile or was the automobile in front of it going down the track?

A. Yes sir.

Q. State what was the position of the automobile with reference to the front of the train—the tender?

A. It was square across the rails, or on the rails—tilted to the right—to the west.

Q. In other words, if I understood you correctly, the automobile was directly in front of the tender of the engine?

A. Yes sir, when I saw it.

Q. And when you saw it where was it in reference to the crossing?

A. I don't get that.

Q. Mr. Nevanpera, let me put it to you in a different way—you heard the crash and looked up?

A. Yes sir.

Q. Just at that time where did you see the automobile and where was the backing engine?

A. It was right in front of the tender.

Q. In reference to the Hardy Avenue crossing?

A. It was right on the track there in front of the tender of the engine.

Q. Did you get down or did you stay where you were?

A. I stayed on top of the hay-stack until the train came to a stop.

Q. What did you do then?

[fol. 23] A. I ran over there.

Q. And when you got there what did you see? Describe to us what you saw?

A. Well, I saw this automobile before it came to a stop, it rolled clear over on to its side and there was people inside of it and suffering awful.

Q. State whether or not the women were screaming at that time?

A. Not at that time; they had stopped screaming when the train came to a stop. Of course they were in awful pain.

Q. How long were they in this automobile before you men were able to get them out?

A. I should say thirty or forty-five minutes.

Q. And what prevented you from reaching in and getting them out right away?

A. We could not get inside of it.

Q. Why not?

A. Well, everything was closed up.

Q. What did you do in order to get inside?

A. We tore the top off from the automobile.

Q. At that time, Mr. Nevanpera, just what was the position of the automobile on the track?

A. It was on its side, lying on its side.

Q. And where was the tender and the wheels of the tender at that time?

A. Well, I think it was kind of caught just a little bit under the tender.

Q. Now, did you take the top off in some manner or fashion?

A. Yes sir.

[fol. 24] Q. And were you then able to reach in and draw the women out?

A. No sir.

Q. Why not?

A. They were fastened in there so tight the conductor, I think, of the train, he took a jack-knife and cut these cushions and things all to pieces and pulled them out piece by piece in order to get in there to do anything.

Q. In other words, the bodies and clothing of the ladies were fastened in such a fashion that they had to cut them out, is that so?

A. Yes sir.

Q. Did you notice whether or not the leg of this lady extended through the frame of the car?

A. It was under the bottom of the car.

Q. And what did you men, or some man, do in your presence in reference to her limb?

A. Well, the conductor, I think he was, of the train—there was a little piece of torn skin and he took and cut that clear off on top of the tie and that severed the lower part of the leg from her body.

Q. Where was that?

A. Between the ankle and the knee somewhere.

Q. And when that was done and she was cut loose they were able to pull the lady out, am I right about that?

A. Well, they had to use a tie there to pry the automobile a little.

Q. You had to pry the automobile out from under the train?

A. Not from under—just enough to release her clothing that was caught in there.

[fol. 25] Q. You used a tie that was in that roadbed there?

A. Yes sir.

Q. Lee Anna was taken out first, was she?

A. Yes.

Q. And then the mother?

A. Yes sir.

Q. Was something put around her leg to stop the bleeding?

A. Which, the mother?

Q. The mother.

A. I don't think it was bleeding at that time.

Q. How long did you stay around the scene of the accident?

A. Until we got them out of there, until we carried them out.

Q. And you put them on the ambulance and took them away?

A. Yes sir.

Q. Was the train then moved?

A. Yes, they moved the train just enough to release the automobile.

Cross-examination.

By Mr. Blakely:

Q. When the train was released that was by the New York Central engine that came down from the east?

A. I suppose so, I don't know what engine, but from that other end.

Q. And pulled the train to the east side of the highway, did it not?

A. Not while I was there, just enough to release the automobile.

[fol. 26] Q. Did you know of the fact that later on it was pulled across to the east side of the highway?

A. I don't remember that.

Q. Let me refresh you, Mr. Nevanpera, didn't the conductor, Mr. Doubledee, take his handkerchief and tie it around Mrs. Meredith's leg a little bit above the ankle, and take a stick and twist it to stop the flow of blood?

A. Yes, I remember that now. I don't know whether he used a stick, but I know he pulled it tight.

Q. Well, down there at the place of the accident the leg was severed just above the ankle, was it not—a little bit above the ankle?

A. Yes sir.

Q. You were working on your hay-stack at the time of the accident?

A. Yes sir.

Q. And had been for a few minutes previous to the time of the accident?

A. Yes sir.

Q. Were you doing the stacking yourself?

A. I was on top of the stack, whether I was stacking or helping the stacker.

Q. You had another man stacking there and you were assisting?

A. Yes.

Q. And your attention, of course, was directed to that work that you were doing?

A. Yes sir.

[fol. 27] Q. You were not looking or listening for trains?

A. No sir.

Q. And all you mean to say is that you didn't hear any whistle or bell rung, is that right?

A. No, I did not hear.

Q. You would not swear that it was not rung, would you?

A. No sir.

Q. And you would not swear that the whistle was not sounded, would you?

A. No, I would not swear to it.

[fol. 28] Owen T. Meredith, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?

A. Owen T. Meredith.

Q. You are the husband of the plaintiff?

A. Yes sir.

Q. How much of a family have you?

A. Wife, two children—a son and daughter.

Q. You are now in business as a merchant in the city of Painesville?

A. Yes sir.

Q. For how many years?

A. Nineteen years this fall now.

Q. You may state whether or not the automobile in this accident, of which there is a photograph here after being struck, was yours?

A. Yes sir.

Q. What kind of a machine was it?

A. A Packard.

Q. Two seated?

A. Yes sir.

Q. Enclosed?

A. Yes sir.

Q. You may state whether or not you have got the exact [fol. 29] model of it now?

A. Yes sir.

Q. Where your wife would be sitting in the seat behind the wheel—it is a left-hand drive—that is, the driver's seat is on the left-hand side of the machine?

A. Yes sir.

Q. Where she would have been sitting there behind the wheel, how high would her head be from the level of the road?

A. Five to six feet.

Q. I understood you took the measurements of this machine?

A. Yes sir.

Q. Tell the jury how far would be the extreme front of her machine from where she would be sitting on the seat—the driver's seat?

A. Nine feet.

Q. You may state whether or not you had the gentleman who has testified about the map—did you take him to where the accident had happened?

A. Yes sir.

Q. You may state whether that is the point marked 657 feet from the crossing—down at this place here (indicating on map)?

A. Yes, sir.

Cross-examination.

By Mr. Nolan:

Q. What model of car was it? First of all, what kind of car was it?

A. A Packard club sedan; six cylinder.

[fol. 30] Q. What year?

A. 1928.

Q. A club sedan—will you describe that body a little further?

A. It has a short body inside and not being a full sedan it has a place for the trunk in the rear.

Q. Is it a two-door car, or a four-door car?

A. A four-door car.

Q. Are the seats permanent or do they tip to the front?

A. No, it has a permanent seat.

Q. How much did the car weigh?

A. I could not say.

Q. You never had the car weighed?

A. No sir.

Q. You never had any investigation made?

A. No sir.

Q. Where is the car now?

A. Down in a garage down on North State Street.

Q. You have another Packard car now, I understand?

A. Yes sir.

Q. What model is that?

A. 1928.

Q. What type?

A. Same type.

Q. Exact duplicate of the other car?

A. Yes sir.

Q. Will you weigh your car and tell us how much it weighs?

[fol. 31] A. Yes sir, I will take it down to the city scales.

Q. How did you test where the level of a person's head sitting in the car would be so many feet above the level of the ground?

A. By sitting in the car. I didn't measure it, just estimated it.

Q. That would depend on how tall that person was?

A. Yes sir.

Q. You just estimated by sitting there in the car and looking at the ground?

A. By a person standing alongside of me and estimating the height of the person.

Q. You estimated five or six feet?

A. Yes sir.

Q. What do you class as the extreme front end of your car?

A. The front end of the bumper.

Q. How far is it from the front of the radiator shell to the front of the bumper?

A. I don't know, I didn't measure it. The same as any other ordinary car, I imagine.

Q. Can you give the jury any idea?

A. No, I could not.

Q. It is a six cylinder?

A. Yes.

Q. Do you know the space from the windshield through over the hood to the front of the radiator?

A. No, I do not.

Q. Can you measure it down at your house and tell us [fol. 32] tomorrow what the distance is?

A. From the back of the hood to the front of the radiator?

Q. Yes.

A. Yes.

[fol. 33] L. L. Dixon, called by the plaintiff for cross-examination under the statute, being first duly sworn, testified as follows:

Cross-examination.

By Mr. Anderson:

Q. Your name?

A. L. L. Dixon.

Q. By whom or what are you employed?

A. By the F. P. & E. Railroad Company.

Q. What position?

A. General manager.

Q. You have charge therefore of all of the different employees and of all the cars and so on on your road?

A. Yes sir.

Q. At the time of this accident you had three hundred cars, in round numbers?

A. In round numbers, yes sir.

Q. You had six locomotive engines?

A. Yes sir.

Q. Those locomotive engines were all practically the same?

A. Yes sir.

Q. This is a map that you had before that—a correct map of the road?

A. It is a map that is corrected from day to day.

Q. The same map that was introduced in evidence in your deposition?

A. Yes sir.

[fol. 34] Q. And that correctly represents your road at the time of the accident, practically?

A. Not by scale, but it represents it in a general way.

Q. What changes have been made since or before, the changes that are different from this map?

A. I could not answer that question.

The map last above referred to was thereupon introduced in evidence by the plaintiff and is hereto attached, marked "Plaintiff's Exhibit 6," and made a part of this bill of exceptions.

Q. This map here is one that you furnished in the other trial at my request?

A. Yes sir.

Q. And that is official, is it not?

A. Yes sir; changes have been made in detail.

Q. Any principal change?

A. No principal change that I know of.

Q. There were thirty-two cars in the train when this accident occurred, were there not?

A. Yes sir.

Q. All of which were loaded but nine?

A. Yes sir.

Q. Gondolas loaded and box cars?

A. I would have to look at the list that I furnished to see which was loaded and which was empty. There were nine empty cars and the rest were loaded.

Q. I understand there were two loads of stone?

A. I don't remember any stone.

[fol. 35] Q. You don't remember that?

A. No sir.

Q. That which you have in your hand is a copy of the car numbers and so on of the train that day of the accident?

A. Yes sir.

Q. That was furnished by you?

A. Yes sir.

Q. Now, tell the jury, please, how many loads of slack coal were there in that thirty-two cars?

A. Twenty-three.

Q. The air was not coupled up in any one or more of those thirty-two cars, was it?

A. No sir.

Q. In other words, the air was not coupled between the locomotive engine and the car to which it was coupled?

A. No sir.

Q. And at this particular grade crossing there were no whistling posts?

A. No sir.

Q. Those thirty-two cars were got where your road connects with the New York Central?

A. Yes sir.

Q. Your road also connects with the Baltimore & Ohio and Nickel Plate?

A. Yes sir.

Q. And it also has connections with the dock at Fairport?

A. Really in Painesville to spot cars on this dock, if that is what you mean?

[fol. 36] Q. Pardon me, your trains run down to Fairport at the dock, is that true?

A. Our switch engines run down, if that is what you refer to.

Q. Aren't there loaded cars taken to the dock?

A. Sometimes, yes sir.

Q. Aren't there loads of things received at the dock by your road?

A. From the dock, yes sir.

Q. As you testified before, they come in from all over the country and by country you mean the United States, isn't that true?

A. Yes.

Q. That is also true of your connection with the New York Central and Baltimore & Ohio, and Nickel Plate, is it not?

A. Yes sir.

Q. As you got these cars at your connecting place with the New York Central, they were coupled together as you understand it—the thirty-two?

A. Yes.

Q. Do you know how many cars had been taken down to the New York Central by this same locomotive engine just a little before that?

A. No sir, I do not. I could find out for you.

Q. From the place where this locomotive engine was coupled on to the thirty-two cars to the yard of the Diamond plant how many grade crossings would you cross?

A. Three.

Q. Was one of these this road where the accident happened?

[fol. 37] A. Yes sir.

Q. And another was U. S. 20?

A. Yes sir.

Q. That is the highway leading from Cleveland to Buffalo?

A. Yes sir.

Q. Very much used, is it not?

A. Yes sir.

Q. And this place where this accident happened it is an improved road?

A. Yes sir.

Q. And there is a park not very far from where Merediths live down there on the lake, with a baseball ground and everything, and the public generally invited to come there, are they not?

A. The township park.

Q. And that increased the number of automobiles using this road at this grade crossing, would it not?

A. I would think it would.

Q. That has been true for quite a number of years, has it not?

A. Yes sir.

Q. How many other crossings on the line of road as shown by this map where there is no whistling post—I mean at the time of the accident?

Counsel for defendant objected to the question as not material.

The Court: I do not see that that is material as to the presence or absence of whistling posts at these other crossings.

[fol. 38] To which ruling of the Court counsel for plaintiff at the time excepted.

Q. Are there other crossings without any whistling posts?

Counsel for defendant objected to the question. The Court sustained the objection. To which ruling of the Court counsel for plaintiff at the time excepted.

Q. There is an orchard there at this crossing?

A. Yes sir.

Q. And you have known that to be true ever since the orchard has been growing, I suppose?

A. Yes, I think so.

Q. And it extends along the railroad for—I am only making an estimate, Mr. Dixon—for about a thousand feet, does it not?

A. I think so, about that.

Q. And the orchard extends along the highway for a distance of about a thousand feet?

A. I would think so.

Q. And some of the trees along the right of way—limbs of those apple trees—extend over into and above the right of way?

A. To some extent.

Direct examination.

By Mr. Blakely:

Q. This little paper which has been shown you——

Mr. Anderson: I object to any further examination of [fol. 39] this witness at this time under the statutory law of Ohio.

The Court overruled the objection; to which ruling of the Court counsel for plaintiff at the time excepted.

Q. This exhibit—Plaintiff's Exhibit No. 6, which has been handed you, where does this come from, if you know?

A. It comes from what is called the Railway Equipment Register.

Q. This is one that Mr. Anderson offered down at the time this deposition was taken?

A. Yes, sir, I think so.

Q. Do you know what date this bears, or what date it was furnished?

A. No, sir, I could not tell you that.

Q. I think you have stated that this railroad where it is shown is not drawn to scale?

A. No sir.

Q. It is simply an advertising proposition?

A. If you drew the railroad to scale you would not be able to see it there.

Q. What book was this in, or what does this come from?

A. It comes from the Railway Equipment Register.

[fol. 40] Thereupon, by agreement of counsel for both parties herein, the testimony of Frank Mahoney as given in the case of Lee Anna Meredith vs. The Fairport, Painesville & Eastern Railroad Company was read to the jury as the testimony of said witness herein, and is as follows, to-wit:

Frank Mahoney, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Give us your full name, please.

A. Frank Mahoney.

Q. Where did you live?

A. 488 East Erie Street, Painesville.

Q. For what length of time have you resided here in Painesville?

A. Forty years.

Q. Substantially all your life?

A. Yes sir.

Q. Did you have occasion to see, or go to the scene of the accident that happened when the Meredith people were injured on the Hardy Avenue crossing?

A. I was there a short time afterwards.

Q. What called your attention that there was some mishap?

[fol. 41] A. I was down that road and the crossing was blocked.

Q. How far were you from the crossing?

A. At the time?

Q. Yes.

A. Well; I was up town at the time——

Q. How did you happen to go to the crossing?

A. I followed an ambulance.

Q. And when you got there, what did you see?

A. I seen an automobile under the engine, and Mrs. Meredith——.

Q. Let us just put it this way—which way was the engine headed when you got there—which direction was the train going if you could tell from its position?

A. The train was going towards Fairport.

Q. And would that be towards the Diamond plant?

A. Yes sir.

Q. And do you remember the number of cars or about how many cars were in the string when you got there?

A. No sir.

Q. How far west of Hardy crossing was the engine itself by the time you got there, in your best judgment?

A. I would say seven or eight hundred feet.

Q. What was the position of the engine and tender and the automobile when you got out to the scene of the actual accident?

A. Well; the automobile was under the back of the tender of the engine.

Q. How was the automobile faced—what direction did [fol. 42] the automobile face?

A. The front end of the automobile?

Q. The front end of the automobile?

A. To the south.

Q. And what direction did the rear end of the automobile face?

A. To the north.

Q. And the tender itself, was it on the tracks or was it lifted up on to the framework of the automobile?

A. It was up on the frame.

Q. To what distance was it lifted up?

A. I would say that the back—the trucks of the tender—was two or three inches off the rail.

Q. When you got there, was Mrs. Meredith or her daughter Lee Anna still in the car itself?

A. Mrs. Meredith.

Q. Where was Lee Anna, if you know?

A. Just carried off.

Q. You got there just about the time they carried Lee Anna away?

A. Yes sir.

Q. Did you get a good look at her as to her appearance at the time they were carrying her away?

A. Lee Anna?

Q. Lee Anna.

A. No, I did not.

Q. They took her away, I take it, with this ambulance [fol. 43] that you followed?

A. They took her in one of them; I don't know which one.

Q. There were two of them there at the time?

A. Yes.

Cross-examination.

By Mr. Nolan:

Q. You drove down from Painesville, down Hardy Road?

A. Yes sir.

Q. And you stopped on the south side of the railroad crossing?

A. Yes sir.

Q. Were there other cars and people there when you got there?

A. Yes.

Q. And you left your car there on the highway and walked west on the track alongside of the train?

A. Yes sir.

Q. Do you know about how many cars there were in that string of cars that were blocking the crossing there then?

A. No, I don't.

Q. You did not count them?

A. No; I did not count them.

Q. Do you know how many there were west of the crossing that stood there when you got there?

A. No, I do not.

Q. Of course, you don't know how many there were east of the crossing?

[fol. 44] A. No sir.

Q. You left your car there and walked west along the track?

A. Yes sir.

Q. Which side of the track did you go on?

A. The south side.

Q. Did you make any measurement of the distance?

A. Of the distance?

Q. Yes.

A. No sir.

Q. So, any estimate that you give of the distance was merely your recollection as you look back now?

A. Yes sir.

Q. You say the automobile was on its side?

A. Yes sir.

Q. And in which direction was its top as it lay on its side?

A. The top was towards Fairport, I believe that would by west.

Q. You think that the frame of the tender was raised up?

A. Yes sir.

Q. Sufficient to lift the wheels off the rail and the rear of the tender off the rails?

A. Yes sir.

Q. Was there anything under the wheels of the tender, as you observed?

A. No sir. That is, on the south side there wasn't anything.

[fol. 45] Q. Did you pay any attention to the rail back along for a distance back of where the tender was stopped—back towards the east?

A. What is that?

Q. Did you pay any attention to the condition of the rails extending back from the tender towards the east?

A. Nothing more than I gathered up some stuff that was in a pocket book along the rails.

Q. Did you not make any observation whether or not the rails were dry?

A. The north rail was dry.

Q. Did you go back along to the highway crossing on the north side?

A. Yes sir.

[fol. 46] JOSIAH JONES, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?

A. Josiah Jones.

Q. What is your age?

A. Thirty-nine.

Q. Where do you live?

A. 345 North St. Clair.

Q. By whom are you employed?

A. By the B. & O. railroad.

Q. In what position?

A. Locomotive fireman.

Q. How long have you been continuously employed by the B. & O. as a locomotive fireman?

A. Eleven years and about one month.

Q. Within that time have you operated an engine?

A. Yes, many times.

Q. You may state whether or not you were on this Hardy Road at the time at which the accident happened, or just shortly before?

A. I was on there right after the accident happened.

Q. You may state whether or not you saw the train—the thirty-two cars—moving on the track across the crossing?

A. They were moving as I was coming down from the Township Park.

[fol. 47] Q. When you say you were coming down, how were you coming, walking or riding?

A. I was riding in an automobile.

Q. Were you driving or not?

A. No; Mr. Wolff was driving.

Q. Was he also an employee of the Baltimore & Ohio?

A. Yes sir.

Q. And how far away were you from the train when you saw it moving on the crossing?

A. I turned at Township Park and was going towards Painesville when I noticed the train.

Q. Coming down to where the crossing was?

A. Yes, we drove down to where the crossing was.

Q. Had the train stopped or was it still moving?

A. The train was just stopped when we got there.

Q. You may state whether or not you saw any members of the crew, conductor or brakeman or any member of the crew—just yes or no?

A. Yes.

Q. And who was it—conductor or brakeman?

A. Conductor.

Q. And where did you first see him after the train stopped?

A. At the end of the train; that is, pretty close to the end of the train, walking down.

Q. That is, close to the road crossing?

A. Yes, pretty close to the road crossing.

Q. Was he toward the front of the train or toward the [fol. 48] rear of the train when you saw him?

A. Toward the rear of the train.

Q. Don't tell the jury what was said, but just tell the jury what you saw him do—I mean the conductor.

A. Do you mean after the accident?

Q. No. Right when you saw him first. Where was he and what was he doing? No conversation.

A. He was walking down toward the head end of the train.

Q. Did you go toward the head end of the train?

A. No, at that time I did not.

Q. How soon afterward did you go?

A. When the brakeman came up and told the conductor they had hit an automobile.

Q. Don't tell what it was that you did. Just say "yes" or "no". Did you hear anything said to the conductor or the conductor say anything at that time?

A. Yes.

Q. Did you shortly thereafter go to the head of the train?

A. Yes.

Q. Was there anybody with you when you went down there?

A. The conductor.

Q. Did you walk together and have some conversation as you were going down?

A. No.

Q. How closely were you together?

A. We was pretty close together and was running.

Q. And when you got to the front of the train tell the [fol. 49] jury just what you saw?

A. When we got down to the train the automobile was across the track and was over on its side, and the tank, or the frame of the tank, was up on the frame of the automobile. That is, the wheels—the back wheels, the tank back wheels—was up that high, I judge, above the track (indicating about eight inches), and Mrs. Meredith and the girl was in this automobile under there *there*.

Q. Describe this tank, if you please, that rested on the automobile?

A. Well, the tank slopes away. It is a tank that the end slopes downward.

Q. Did you notice whether or not there was a foot-board at the rear of the tank, which would be the front of the tank as it went that way?

A. No. I did not notice that.

Q. Tell the jury just what was done and what you did, if anything, before getting the Meredith ladies out from this wreck?

A. Well, we tried to get a post out first over there. We thought maybe we could pry the car up a little bit. But, we didn't do it. They were wedged in there pretty tight and we tried to get the girl out first. We cut the cushions. Mr. Doubledee did that. And we cut the top of the car off with a coal pick and got the girl out of there, and Mrs. Meredith was still in the car.

Q. Did you notice so that you can tell the jury, any in- [fol. 50] juries on Mrs. Meredith, the mother—if so, what did you notice?

A. No. I did not notice anything wrong with Mrs. Meredith at the time. I could not see whether she was injured or not.

Q. Now, Mr. Jones, you have been a locomotive fireman about eleven and a half years?

A. Eleven years and a little better than one month.

Q. You say within that time you have many times done the work of a locomotive engineer in operating an engine?

A. I have operated them at times, yes.

Q. You may state to the jury if that locomotive engine was such an engine as you have been operating—standard engines?

A. Yes, they were.

Q. Is there a sand box—do you call it a sand box?

A. Yes.

Q. Where is it located on the standardized engines?

A. Right over the top of the boiler.

Q. And what is the purpose of the sand box on a locomotive engine?

Counsel for defendant objected to the question as not being a part of the plaintiff's case.

The Court: It is a circumstance in the case. I think he may show. The objection is overruled.

To which ruling of the Court counsel for defendant at the time excepted.

A. Well, the object of the sand box in there is to use the sand when applying the brakes and also to keep the [fol. 51] engine from slipping when you are starting a train.

Q. What do you have to touch or move on the locomotive engine to permit the sand to go upon the rails—is there a pipe or anything leading from the sand box down to both rails, one on each side?

Mr. Blakely: We object and except to this line of questions.

The Court: Yes, it is coming in over your objection and exception.

A. Yes sir.

Q. Do these pipes that convey the sand under certain circumstances to the rails—do both of these pipes go to the same sand box, or are there two sand boxes?

A. The ones on the back go to the back and the ones on the front go to the front.

Q. What do you mean by the front and what do you mean by the back?

A. They put a box forward to put sand in front and one in the dome—in the back—to put sand in the back. They have two sand boxes on it.

Q. Assuming, Mr. Jones, a train of cars, thirty-two in number, nine empty; assuming a dry day, dry rails, dry track; assuming the train is moving ten miles an hour; assume that it is down grade—one-half per cent. only; the tender is in backward motion, or the locomotive engine is in backward motion, the tender ahead—pulling the thirty-two cars—within what distance in an emergency, [fol. 52] with the use of sand, with the use of all things with which a standardized locomotive engine is equipped, within what distance can that train be stopped with the use of the brakes on the locomotive engine alone?

Counsel for defendant objected to the question.

The Court overruled the objection. To which ruling of the Court counsel for defendant at the time excepted.

A. Well, I would figure that it should stop anywhere, anyway, within two or three hundred feet—my way of figuring anyhow—I have stopped them on grades worse than that.

Counsel for defendant moved the Court to exclude the last answer. The Court overruled the motion. To which ruling of the Court counsel for defendant at the time excepted.

Cross-examination.

By Mr. Blakely:

Q. Mr. Jones, that day you were riding down with one Mr. Wolff, were you not?

A. Yes sir.

Q. And you had been at his cottage down near Sunset Point?

A. Yes sir.

Q. That is on the Lake Road some distance east of the Township Park, is it not?

A. Yes sir.

Q. On the day in question you were driving with Mr. Wolff—that is, you were riding with Mr. Wolff in his automobile going west on the Lake Road, were you not?

[fol. 53] A. Well, we were coming towards Painesville. I don't just get the direction there myself.

Q. You were coming towards Township Park from the east, were you not?

A. Yes sir.

Q. And when you got almost opposite the entrance to the Township Park down near the lake you turned to the left towards Painesville, did you not?

A. Yes.

Q. And then, from that time on until you arrived at the place of the accident you were going south, were you not?

A. I was coming towards Painesville, yes.

Q. Do you know the directions there at all?

A. No, I don't know the directions in there.

Q. Have you lived here in Painesville a great many years, Mr. Jones?

A. No, I have been living in Newcastle.

Q. How many years have you been living here?

A. I have lived here a little better than a year.

Q. You knew anyway that you were coming towards the town of Painesville?

A. Yes sir.

Q. Now, I think you have said that as soon as you turned the corner down there at Township Park you saw this train moving slowly over the crossing?

A. Yes sir.

Q. And that was a distance of somewhere near a mile away, that or three-quarters of a mile?

[fol. 54] A. I figure between half and three-quarters of a mile, somewhere in there.

Q. Well, you know where the Meredith cottage is, I suppose?

A. No, I don't know exactly where it is.

Q. That is within two or three houses of the Lake Road, as I understand. Did you know it was something like seven-tenths of a mile down to the Meredith cottage—.69 of a mile from the railroad crossing?

A. No, I did not.

Q. Well, would that be about correct, would you say?

A. Well, I figure probably around in there. It might be.

Q. The road all the way from the Township Park entrance is straight, practically, is it not; so that you can see right up to the railroad track and crossing for some distance?

A. Yes.

Q. Now, you have spoken of this tender on the locomotive, how high is the locomotive?

A. How high is it?

Q. Yes.

A. Well, I don't know just the heighth of them.

Q. Approximately how high was this one, is what I am getting at?

A. Oh, I don't know; about fifteen feet high, I imagine.

Q. About how long?

A. Probably around about sixty or seventy feet—that is, the tender and engine.

Q. I am speaking of the engine.

[fol. 55] A. Probably, say about thirty-five or forty feet, somewhere.

Q. How long is the tank—the tender, I am speaking of—when we speak of the tank or the tender, it is interchangeable, is it not?

A. Yes, it is the same thing. Oh, I figure the tank would be fifteen or twenty feet—something like that.

Q. How high is the tank? How high was this one—I am speaking particularly of this tank?

A. I figure it would be between twelve and fifteen feet—that is, from the ground right up to the top.

Q. Now, at the back end of the tender it slants down somewhat, does it not?

A. Slopes down.

Q. That is a short slope, is it not?

A. That is a gradual slope from the coal.

Q. The greater part of the tender has the full heighth that you have spoken of, has it not?

A. No, I would not imagine it would be on a little engine like that.

Q. I am not asking you to imagine, Mr. Jones, but what did you observe?

A. Well, I would say that the sloping part of it was the biggest part of it.

Q. It is twelve, or ten or twelve feet, I think you said, high—it starts from that and gradually slopes down until you get down to very near to the coupling apparatus?

A. Yes.

Q. And that coupling apparatus was several feet off the [fol. 56] ground, was it not?

A. Probably a little better than four feet.

Q. So that the end as it sloped down was at least four feet higher than the ground?

A. It is higher—the coupling is—it is up.

Q. Perhaps another few feet or so?

A. A foot and a half or so.

Q. Of course the ability to stop depends upon the conditions which surround a particular operation, does it not?

A. Yes.

Q. And if the rails are slippery from any cause you cannot stop so readily as you can if they are dry?

A. No.

Q. And if you had oil on one or both rails that would make a difference in your ability to stop, would it not?

A. Yes sir.

Q. And it is impossible to say, I suppose, just exactly, if you had oil on the rails, within what distance you could stop?

A. It is hard telling where you would stop.

Q. About the only way to tell would be by trying it under the same conditions?

A. That would be the only way I know.

Redirect examination:

Q. Was it a sunshiny day, or do you remember?

A. Yes, it was a clear day.

Q. Now, you were going down on the Hardy Road in a [fol. 57] southerly direction, were you not?

A. I was coming towards Painesville.

Q. When you first saw the train ahead of you moving on the crossing was there an orchard to your left at that time?

A. Yes.

Q. Did you see any other automobile between you and the train on the highway?

A. No.

Q. Did you hear any whistle or any bell?

A. I did not notice.

Q. You did not hear any?

A. I did not notice it, whether it blew or didn't blow—I didn't pay no attention.

Q. Pardon me—just answer my question. Did you hear any?

A. No sir.

Q. Where does your company, if you know, get the sand for the sand boxes on the locomotive engines?

Counsel for defendant objected to the question.

Q. Put it this way—what color is the sand that you use in the sand boxes?

A. White.

Recross-examination:

Q. Mr. Jones, you spoke about when you first saw the train and the orchard being on your left. You hadn't got anywhere near the orchard when you first saw the train, had you?

A. I thought, in the direction we were coming the orchard would be on our left.

[fol. 58] Q. You were a half or three-quarters of a mile from the orchard when you first saw the train?

A. Just turning at Township Park when I first saw it.

Q. That would be about three-quarters of a mile away?

A. Yes sir.

Q. When you first turned that curve three-quarters of a mile away, the engine and tender had gone across the highway?

A. Yes.

Q. And I think you said you did not pay any attention and do not know whether the train whistled or not?

A. Yes, that is what I said.

Q. Or whether the bell was rung or not, you do not pretend to know, do you, Mr. Jones?

A. No sir.

Redirect examination:

Q. When you got down to the railroad crossing the train was still moving, as I understood, a little distance after that, is that true?

A. Just about came to a stop when I got there.

Q. It had not come to full stop when you got there, had it?

A. No, not exactly.

[fol. 59] C. L. **Fisher**, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name?
A. C. L. Fisher.
Q. Your age?
A. Fifty-one.
Q. Are you married?
A. Yes sir.
Q. You lived where, with you family?
A. Youngstown.
Q. Are you engaged at the present time in any business—if so, what?
A. In the garage business.
Q. You may state whether or not you have ever been a locomotive engineer?
A. Yes sir.
Q. On what road?
A. The Erie.
Q. For how many years continuously, Mr. Fisher?
A. 21 years.
Q. Running what different kinds of trains?
A. Freight and passenger and yard engines.
Q. You testified here last week, did you not?
A. Yes sir.

[fol. 60] Q. What is the air system on a train known as the Westinghouse?

A. It is a system used to control the brakes by the engineer.

Q. From what place on the train, when you have air coupled up and angle cocks in proper position, is the air controlled in the braking system?

A. By the engineer.

Q. Explain how that is done and what you have got on your locomotive engine to set the brakes?

A. You have a brake valve and your gauges to go by.

Q. How many wheels are there under the standardized cars—how many wheels under each of the 32?

A. Four under each car.

Q. A brake shoe would be what size? I mean not on the locomotive engine, but under the cars?

A. Three by fourteen, I believe.

Q. Are there brakes on the locomotive engine and tender?

A. Yes sir.

Q. And what size are those brake shoes?

A. The ones on the tender are the same as the cars.

Q. And on the engine how is it?

A. The ones on the engine are 5½ x 16.

Q. They are larger than the ones on the cars?

A. Yes sir.

Q. And I apprehend the more square inches in the brake shoe, the more power you have in braking?

[fol. 61] A. Yes sir.

Q. Now, assuming a locomotive engine to be a little over 150,000 pounds, and the tender being 100,000 pounds, and standardized brakes, such as you have suggested, within what distance on a 1½ per cent grade could, in great emergency, a train be stopped, when it was pulling 32 cars, all of which were loaded except 9, using all of the things that you do use in an emergency?

Counsel for defendant objected to the question. The court overruled the objection. To which ruling of the court counsel for defendant at the time excepted.

A. I could not answer it unless you ask what speed.

Q. At ten miles an hour, on that grade at ten miles an hour, within what distance?

Counsel for defendant *overruled the* objected to the question. The court overruled the objection. To which ruling of the court counsel for defendant at the time excepted.

A. Less than three hundred feet.

Q. Now then, if all the air brakes were under the control of the locomotive engineer, and the air gauges and so on were normal and could be used—within what distance could that same train, going at that same rate of speed, under the same situation, be stopped, when you could use all the brakes?

[fol. 62] Counsel for defendant objected to the question. The court overruled the objection. To which ruling of the court counsel for defendant at the time excepted.

A. That is at the same speed?

Q. The same speed?

Counsel for defendant objected to the question. The court overruled the objection. Defendant excepted.

Q. Let us assume that our agreement of ten miles an hour still stands good, that having been agreed that the speed of the train was ten miles an hour—32 cars, 9 empty and the rest loaded, that the locomotive engine was the size and weight that I have described, in backward motion—within what distance, in an emergency, could the train be stopped, provided they could use all the air?

Counsel for defendant objected to the question. The court overruled the objection. To which ruling of the court counsel for defendant at the time excepted.

A. Less than 150 feet.

Q. Tell the court and jury, Mr. Fisher, what is the sand box used on the standard engine?

A. A sand box is placed on top of the locomotive and filled with sand for use.

Q. About how much sand does it hold?

[fol. 63] A. The big majority of them hold about three bushels, and there is one on each end—front and back.

Mr. Blakely: We wish to object and except to this whole line of questions.

(No ruling.)

Q. What color of sand do they use?

A. The sand is white.

Q. Describe, on the standardized engines, how the sand goes to the rail from the sand box—explain to the jury?

A. It is poured through pipes from the sand box to the rails, by air.

Q. Where, in reference to the wheels of the locomotive engine, does it strike the rail—on just one or both rails?

A. Both rails.

Q. Where does it strike the rail in reference to the location of the wheels—before or behind, or how?

A. Well, both before and behind.

Q. In other words, if the locomotive engine is backing up, you can apply the sand in the same degree as if it was going forward?

A. Yes sir.

Q. Through what is the air taken back to the different cars from the locomotive engine, where it is generated?

A. It goes to the brake valve first, and from the brake [fol. 64] valve to the pipes and through the hose to the triple valves in the car.

Q. That is called a "train line" is it not?

A. Yes.

Q. And where is the hose located—and describe the hose?

A. The hose is on the end of each car.

Q. And what is on the end of each hose?

A. There is a casting on there.

Q. When you couple up, just show the jury what you do when you couple up the air.

A. There is a casting on the end of each hose, and half a turn locks the hose.

Q. Indicate the motion.

A. Just put it together like this and pull it down.

Q. It takes about half a minute?

A. No; not that long.

Q. What is an angle cock?

A. It is to prevent the air from escaping.

Q. Where is it located?

A. One on each end of the car and locomotive.

Q. What is its purpose?

A. To prevent the air from escaping out of the train pipe.

Q. What is the normal air pressure in a train?

A. In a freight train, 70 pounds braking pressure, and 100 pounds excess pressure.

[fol. 65] Q. In what manner is the brakes applied—by increasing the air or reducing the air?

A. The air is reduced in the train pipes, allowing the triple to move.

Q. If you had 70 pounds in your train hose and air in your train line, and of course the angle cocks are not at right angles in the last car, how much would the air have to be reduced to set all the brakes on the car—how much under 70 pounds would it have to be reduced to set the brakes?

Counsel for defendant objected to the question. The court overruled the objection. To which ruling of the court counsel for defendant at the time excepted.

A. In emergency or service?

Q. Mr. Fisher, assuming now that you are an engineer, that you have 32 cars and have air in all the cars and you want to set your brakes, and assuming you had 70 pounds pressure per square inch all through the freight train—how much would the air be reduced under 70 pounds per square inch in setting the brakes?

A. The air in the train pipe would be reduced and naturally the air in the auxiliary would go into the brake cylinder at 50 pounds. You would have 50 pounds in your brake cylinder.

Q. Assuming that you had 32 cars and your air coupled up and the air pressure as it should be in your locomotive engine, how long would it take when you applied the air, [fol. 66] to set the brakes upon the 32nd car from the locomotive engine?

A. In an emergency I suppose five seconds.

Cross-examination.

By Mr. Blakely:

Q. How long would it take before it would be effective on the engine, Mr. Fisher? At once, would it not?

A. About a second, I suppose.

Q. That would be the first place that you would apply it?

A. Sure.

Q. And how soon it might get down to the end of any cars that might be attached would depend upon the distance away the last car was, I assume?

A. The train pipe reducing would reduce instantly in an emergency.

Q. But I say the time in which it would be effective first would be there at the engine, at the point where it is first reduced?

A. Yes.

Q. And if you had a very long train, down at the end it would not get it so soon?

A. You would get it almost instantly.

Q. Perhaps five seconds or thereabouts, depending on the distance?

A. Maybe it would be five seconds in the last car.

Q. It would depend on the length of the train?

A. Yes sir.

[fol. 67] Q. The conditions surrounding any particular instance where you were attempting to brake a train of cars would determine to some extent the distance within which you could stop, would they not?

A. I don't quite get that.

Q. The conditions surrounding the particular instance that you might be in, might determine to some extent the distance within which you can stop, would they not?

A. Circumstances do not vary very often in braking conditions.

Q. You have sometimes wet rails and sometimes dry rails. Isn't that true? You know that of course, by experience?

A. Sure.

Q. You have slippery rails and rails that are not slippery, do you not?

A. Yes sir.

Q. And you have grades and level ground, do you not?

A. Sure.

Q. Do not all of these things enter into the question of how soon you are able to stop?

A. Sure.

Q. You have spoken of the auxiliary cylinder in each car. How does that operate? What process does the air go through in going through that cylinder, what does it do, what happens?

[fol. 68] A. The air goes through the triple valve into the auxiliary.

Q. Where does it go then?

A. From the auxiliary into the brake cylinder.

Q. What does it do in the auxiliary cylinder—what is the process there?

A. The process there—it is equal.

Q. Are there any valves in that cylinder?

A. In the auxiliary there is a release valve in there, a bleeding valve.

Q. You have seen them, I suppose—I do not know whether you have or not—Did you ever see one of them cut open—one of these auxiliary cylinders?

A. Not unless it was fastened open.

Q. Have you seen one of them cut open so that you could see how it operates on the inside?

A. Yes sir, sure.

Q. How does it operate?

A. So you can raise it and it admits atmosphere.

Q. When you have done that, what happens—where does the air go when it first goes into that auxiliary cylinder?

A. It stays there until you use it.

Q. What is on the inside of it—Just an empty cylinder?

A. Yes; it is an empty cylinder. Only pipes connect to it at each end.

Q. Is there any other apparatus there before it goes to [fol. 69] the brakes?

A. The triple valve.

Q. Where is that?

A. Connected to the auxiliary reservoir.

Q. Right to the pipe, is it not?

A. Yes sir.

Q. What happens when the air goes through that triple valve, through what process does it have to go before it is released against the brakes?

A. It goes through a pipe to the brake cylinder.

Q. A very small orifice, is there not, for the air to go through?

A. There is two in there, one for service, and a larger one for emergency.

Q. When did you leave the railroad service?

A. About four years ago.

Q. Were you working for the Erie Railroad—was that the last service that you rendered in railroad service?

A. Yes sir.

Q. Where is this garage that you own—or do you own it or work in it?

A. I work in it myself.

Q. Automobile mechanic, is that right?

A. Yes sir.

Q. Did the railroad release you from service?

A. I think they did.

[fol. 70] Redirect examination:

Q. I was about to ask you, Mr. Fisher—on a standardized engine, what is the size of the pipe leading from the sand box to the rail?

A. Inch pipe, I believe, Mr. Anderson.

[fol. 71] LEE ANNA MEREDITH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Your name, please.
A. Lee Anna Meredith.
Q. You are the daughter of the lady that got hurt?
A. Yes sir.
Q. You live down on what road?
A. Hardy Road.
Q. And about how far from these railroad tracks?
A. Oh, less than a mile, I think.
Q. You may state your age.
A. Twenty years old the 13th of June.
Q. On which side of the automobile were you sitting as you went down to the place of the accident?
A. On the right side.
Q. Your mother was driving the car?
A. Yes sir.
Q. Did you ever drive an automobile before this accident?
A. Yes sir.
Q. Had you ridden with your mother many times before this accident?
A. Yes sir.
Q. What kind of a machine was your mother driving?
A. A Packard.
[fol. 72] Q. That was owned by your father?
A. Yes sir.
Q. You are familiar, of course, with these railroad tracks?
A. Yes sir.
Q. About what time of day was it?
A. Afternoon.
Q. Was it a sunshiny, clear day, or otherwise?
A. Clear and sunshiny.
Q. Now, as you went toward the crossing, or back quite a little distance, how fast was your mother driving the Packard car?
A. Between twenty and twenty-five miles an hour.

Q. As you got down to the crossing you may state whether or not you looked in either direction—if so, in which direction did you look?

A. I looked to the right.

Q. Why did you look to the right, if you had any reason, instead of looking to the left, at that place?

A. Well, it was an unobstructed view. I could see down that way.

Q. When you looked to the right did you see any train at all?

A. No sir.

Q. There is an orchard there to your left as you go down toward the crossing, is there not?

A. Yes sir.

[fol. 73] Q. I show you here a photograph that was taken a few days after the accident. You may state whether or not that is the orchard that you refer to, that you can see there in that picture?

A. Yes sir.

(Photograph marked for identification "Plaintiff's Exhibit B".)

Q. Could you see through the orchard and see the railroad track, or see any train at all?

A. No sir.

Q. Now, as you got down past the orchard, or just passing the orchard, you may state whether or not you looked again?

A. Yes; I looked to the left.

Q. What did you see in reference to any train?

A. I saw a train there.

Q. You saw a train to the left?

A. Yes sir.

Q. And then what happened?

A. We were struck.

Q. Now, about what rate of speed was the Packard car moving when you looked to your right and left?

A. Why, it was gradually slowing down all the time.

Q. About what rate of speed, if you can give it?

A. Oh, two or three miles an hour.

Q. You knew the railroad crossing there?

A. Yes sir.

[fol. 74] Q. You may state whether or not, so far as your senses were concerned, you were looking out and trying to hear any train coming?

A. Yes sir.

Q. Your hearing is all right?

A. Yes sir.

Q. Now, as you were going down to that grade crossing, along the orchard, where you could not see to your left, were there any whistles sounded at all?

A. No sir.

Q. Was there any bell continuously rung at all, or in any other way rung?

A. No sir.

Q. Now, the automobile in which you were riding, was it carried down the track?

A. Yes sir.

Q. With your mother and you in it?

A. Yes sir.

Q. At any time, from the time your automobile was picked up until it got away down there, were you injured at all?

A. No sir.

Q. Was your mother injured at all—was your mother, so far as you observed, injured at all?

Counsel for defendant objected to the question. The court overruled the objection. To which ruling of the court counsel for defendant at the time excepted.

[fol. 75] A. No sir.

Q. Did you make any noise or scream, or talk, or anything, you and your mother?

A. While we were going down the track?

Q. This train kept on moving?

A. Yes sir.

Q. And at last you stopped?

A. Yes sir.

Q. What did you notice or feel in the way of any jar or movement of the automobile before the train stopped, if you experienced any?

A. At the very last, the machine suddenly tilted.

Q. Then what happened right after that tilting?

A. We were injured.

Q. Tell the jury as far as you can remember, just how you were injured, just after that tilt.

A. There was a sudden jolt. It felt like our clothes were being pulled—like going through a washing machine wringer.

Q. Were you and your mother afterwards taken to the hospital?

A. Yes sir.

Q. How long did you remain there?

A. Fifteen weeks.

Cross-examination.

By Mr. Nolan:

Q. Where were you living at this particular time, Miss Meredith?

[fol. 76] A. Hardy Road.

Q. Down to the Lake?

A. Yes sir.

Q. Prior to that you lived here in Painesville?

A. Yes sir.

Q. In 1929, were you living all the year round at the lake or just summers?

A. Just summers.

Q. This happened the 19th of July?

A. Yes sir.

Q. How long had you been at the lake that summer before the accident?

A. Maybe about a month.

Q. And on this particular day your mother was driving into Painesville?

A. Yes sir.

Q. About what time did she leave home?

A. Sometime after three.

Q. Tell the jury where your home is on the Hardy Road.

A. It is right across from the entrance to the Park.

Q. On which side of the road?

A. The right side.

Q. That would be the east side—the right side going towards the Lake?

A. Yes sir.

Q. About how far from the railroad crossing?

A. It is less than a mile.

[fol. 77] Q. Close to a mile, would you think, or somewhat less?

A. Near a mile, I should think.

Q. On this particular day you and your mother started from your home, as you have described, to go up the Hardy Road to Painesville, or towards Painesville?

A. Yes sir.

Q. Just the two of you in the car?

A. Yes sir.

Q. Packard car?

A. Yes sir.

Q. You were riding in the front seat?

A. Yes sir.

Q. Your mother was driving the car?

A. Yes sir.

Q. And you were sitting on her right?

A. Yes sir.

Q. As she came up the road, which portion of the road was she driving on?

A. Center.

Q. Right in the center line of the pavement?

A. Yes sir.

Q. She kept on that side of the road right up to the railroad crossing?

A. Yes, I think so.

Q. At what speed did she drive after she headed out of her driveway down and coming to the railroad crossing?

[fol. 78] A. Between twenty and twenty-five miles an hour.

Q. Is that your judgment, or the speedometer on the car?

A. That is my judgment.

Q. You did not look at the speedometer?

A. No.

Q. Was there anything that fixed that in your mind? Any definite idea of the rate of speed that she was driving before the accident?

A. No sir.

Q. Just general recollection—that is all you claim to have?

A. Yes sir.

Q. She started to slow down, did she, sometime before getting to the railroad tracks?

A. Yes sir.

Q. How close had she got to the railroad tracks before she started to slow down?

A. About two hundred feet.

Q. What did she do by way of slowing down?

A. Well; just gradually slowed down.

Q. Do you know whether she applied her brake or simply reduced the gas supply?

A. I don't know.

Q. And from that point how did she operate the car, after she slowed down? Having slowed down somewhat, did she go at a uniform rate, or continue to go slower and [fol. 79] slower as she got up to the point of the crossing?

A. I think she gradually slowed down.

Q. So, when you got up to the north rail of the track, how fast was the automobile going?

A. Just a few miles an hour.

Q. Can you tell the jury approximately how many?

A. About two or three miles an hour.

Q. Just barely moving?

A. Yes sir.

Q. And for some little distance back you had been gradually going down to that speed?

A. Yes sir.

Q. So that, back, 20 or 25 feet from the crossing, how fast do you think your mother was driving the car that day?

A. Oh, about 7 or 8 miles an hour, probably.

Q. What were you and your mother doing just before you got—during the time you travelled that 200 feet north of the track?

A. Sitting there.

Q. Talking?

A. No sir.

Q. Did you say anything to your mother during that interval?

A. No sir.

Q. Did she say anything to you?

A. No sir.

Q. Looking ahead, were you, all the time?

[fol. 80] A. Yes sir—until I looked to the right to see if a train was coming.

Q. How far were you north of the track when you looked to the right?

A. Maybe about 20 feet.

Q. The track curves a little bit as you look to your right, does it?

A. Yes sir.

Q. You turned your head and looked to your right towards Fairport?

A. Yes sir.

Q. And your automobile was going forward all the time towards the railroad track?

A. Yes sir.

Q. Did you say anything to your mother at that time?

A. No sir.

Q. Did she say anything to you?

A. No.

Q. And, of course, when you looked to the right you could not tell what your mother was doing, except that she was driving the car along the pavement?

A. No.

Q. Was there any musical instrument in the car?

A. In the back of the car there was.

Q. What was it?

A. Two banjos.

Q. They were put in before you started from home?

[fol. 81] A. Yes.

Q. Who put them in?

A. My mother did, I guess. I know I did not put them in.

Q. Do you know that was the time they were put in—at the time you started from home?

A. Yes sir.

Q. As you came up—during this 200 feet that you traveled—at a slower and slower rate, your mother was still driving on the right hand side of the pavement?

A. Yes sir.

Q. And she did not at any time turn to the left to go off the left side of the pavement before she got to the railroad track?

A. No sir.

Q. You saw at some time this tender that struck your automobile, did you?

A. Yes sir.

Q. Where were you at that time with reference to the north rail of the track?

A. Right there.

Q. That was when you first saw the portion of the locomotive that was nearest you?

A. Yes sir.

Q. So, it was a very short distance from you at that time, is that what you mean?

A. Yes.

Q. Can you tell the jury how far it was from you when [fol. 82] you first saw it—from your automobile?

A. No sir.

Q. Can you give us any idea?

A. It was right there.

Q. Practically together?

A. Yes sir.

Q. Had you looked to the east at all before that, to your left?

A. Before I saw it?

Q. Yes.

A. No sir.

Q. You had not looked to the east and so you did not see where your mother was looking, did you?

A. No sir.

Q. And therefore you do not know whether she looked to the east or not—I mean from your own knowledge?

A. No sir.

Q. And then you say that was when the front wheels of the automobile in which you were riding was practically on the north rail?

A. Yes sir.

Q. And you had not been looking to the east before that?

A. No sir.

Q. You said, I believe, there was not any whistle blown or bell rung?

A. No sir.

Q. You mean, I assume, that you did not hear any?

[fol. 83] A. There wasn't any.

Q. Were you listening for any?

A. Yes sir.

Q. Are you always listening for a whistle or bell before crossing railroad tracks?

A. Yes sir.

Q. You are twenty now?

A. Yes sir.

Q. You were 18 at the time of the accident?

A. A month before.

Q. You had graduated at the high school just before that?

A. Yes sir.

Q. You say the tender struck your automobile while you were on the right hand side of the pavement and on the railroad crossing?

A. Yes sir.

Q. What happened to your automobile then?

A. Started going down the track.

Q. Towards the west—toward Fairport?

A. Yes sir.

Q. Did it tip over?

A. It was over slightly.

Q. It was tilted, was it, to one side?

A. Yes, a little bit.

Q. In which direction?

A. It was tilted towards the west.

[fol. 84] Q. The top of it was tilted toward Fairport—toward the west?

A. Yes sir.

Q. Did that tilting continue more and more—did the car tip more and more down the track?

A. Well, probably a little bit.

Q. Did the door come open at some time?

A. Yes sir.

Q. I mean the door on the right hand side—you were sitting on the right hand side?

A. Yes sir.

Q. And did that door come open while the car was tilted?

A. Yes sir.

Q. Did you notice what became of the door?

A. No; it just disappeared.

Q. And you were frightened and screaming?

A. I was screaming.

Q. Were you frightened?

A. Yes.

Q. The door disappeared and you did not see it any more, is that what you mean?

A. Yes sir.

Q. The car went down on its side?

A. Not on its side, I don't believe; it was tilted.

Q. Did it go down on its side at any time?

A. Well; at the very last.

Q. How far did it move, do you say now, after it went [fol. 85] down on its side?

A. How far did it move after it was completely on its side?

Q. Yes.

A. It was right at the accident that it completely tipped —looked like.

Q. How far did it move after it was, as you now say, completely over on its side?

A. That I don't know.

Q. You testified in the case you had growing out of this accident in this court last week?

A. Yes.

Q. And you were asked about these same matters?

A. Yes sir.

Q. Were you asked this question—"And the automobile tipped over and was on its side, was it", and did you answer "Yes"? Do you remember that?

A. Yes.

Q. And your answer was correct, was it?

A. Yes sir.

Q. And was this question asked you—"Was it shoved along some distance in that position"—and did you answer, "Yes, some distance"?

A. Yes sir.

Q. And was this question asked you, "The whole distance"—and did you answer, "Yes sir"?

A. Yes sir.

Q. Was that correct when you answered that way?

A. I think I did.

[fol. 86] Q. And then was this question asked you, "Was the head of it, or front of it, rather, towards Painesville—if you can speak of it in that way"—and did you answer, "Yes sir"?

A. I don't think so.

Q. You mean that you do not recall it? I am not asking you now what you remember, but whether this question was asked you and whether you answered it in this way—question, "Was the head of it, or front of the car, towards

Painesville—if you can speak of it in that way"—and did you answer, "Yes"?

A. Yes sir.

Q. And was this question asked you, "And was the automobile almost directly across the rails"—answer, "Yes" —"And tipped over on its side"—answer, "Yes"—question. "And shoved along ahead of the tender in that way"—answer, "Yes"—were these questions asked and did you make those answers?

A. Yes sir.

Q. And that was true when you answered that?

A. Yes sir.

Q. And you testify that way now, that the automobile was on its side and shoved along ahead of the tender the whole distance, but it was not completely over on the whole right side—it was shoved some distance on its side?

A. It was at an angle; it was not completely over.

Q. Was it at any time on its side?

A. At the very last it was.

[fol. 87] Q. Let me ask you again: you said you recall this question being asked, "Was it shoved along some distance in that position"—and you said, "Yes sir, some distance"?

A. Yes sir.

Q. And then this question, "The whole distance"—and you answered, "Yes sir"—was that true when you answered?

A. Yes, it was not clear over so the whole right-hand side was down flat.

Q. Since you testified this last week on this week have you talked with anybody about your testimony?

A. With my father and mother probably.

Q. You talked about your testimony on this point?

A. I don't think so.

Q. You are sure about that?

A. No sir.

Q. Have you talked with the lawyers at all about your testimony since you were on the witness stand in the other case?

A. No sir.

Q. Not a word about it?

A. No sir.

Q. You have talked with your father and mother?

A. Yes.

Q. This is your mother's case?

A. Yes sir.

Q. And your father has other cases growing out of this accident?

A. Yes sir.

[fol. 88]. Redirect examination:

Q. Please tell us, Miss Meredith, whether either one of your ankles were injured—just "yes" or "no"?

A. Yes sir.

Q. Which one?

A. The right one.

Q. Tell the jury just where your ankle got hurt—what position you were in and where?

A. Well, at the end I was all doubled up and my knees were up here against by chest, and the back of my foot was up here against the back, and my right foot was wedged between the top and the rail.

Q. I hand you here the same picture that you saw a little bit ago—the same exhibit. You may state whether or not those cross arms on these posts were on each side of the crossing at that time?

A. Yes sir.

Q. I hand you here another exhibit of the crossing—do you notice a certain post down there?

A. Yes sir.

Q. Was that there at that time?

A. No sir.

Recross-examination:

Q. Was there any post there?

A. Just the cross arm.

Q. Can you describe that a little bit to the jury—the sign post that was there north of the railroad track at the time of the accident?

[fol. 89] A. Just the ordinary cross arms.

Q. How high was it above the ground, approximately?

A. Maybe ten feet.

Q. Somewhat higher than a man's head?

A. Yes sir.

Q. And painted what color?

A. White, I think.

Q. Had words painted on it?

A. Yes sir.

Q. And you knew there was a railroad crossing there, anyway, didn't you?

A. Yes sir.

Q. And your mother knew it?

A. Yes sir.

[fol. 90] OWEN T. MEREDITH, a witness on behalf of the plaintiff, being recalled for further cross-examination, testified as follows:

By Mr. Nolan:

Q. Mr. Meredith, we asked you last night to get the weight of your automobile?

A. It is between forty-one and forty-two hundred pounds. My wife and daughter were in the car when I had it weighed.

Q. That is the weight of the car including your wife and daughter?

A. Yes; between forty-one and 42 hundred pounds.

Q. Can you give us any closer idea of what it weighs between those figures?

A. Well, deduct my wife's weight and my daughter's weight from it. You have the figures there.

Q. What is the correct weight?

A. 4430 pounds.

Q. Do you know the correct weight of your wife and daughter?

A. My wife will weigh 150 pounds and my daughter weighs about 92 pounds at this time.

Q. Your wife weighs 150?

A. 150.

Q. Is that her actual weight, do you know?

A. I could not give her actual weight in pounds. In that neighborhood.

Q. That is your estimate?

[fol. 91] A. Yes sir.

Q. So, when you give the weight of the automobile as between 41 and 42 hundred pounds, you approximate between those figures?

A. I could not give it exactly, no.

Q. You were also asked to give the length of the car from the windshield to the radiator.

A. From the windshield to the front end of the radiator.

Q. What is the length?

A. 55.

Q. I mean the radiator shield, that is just in front of the radiator cap.

A. Five feet.

Q. The plaintiff here, Mrs. Meredith, is your wife?

A. Yes.

Q. And you have yourself two actions pending against this defendant company?

A. Yes.

Q. Growing out of this accident, I mean?

A. Yes sir.

[fol. 92] CHARGE AS TO VIEW OF PREMISES

Thereupon, it was agreed between counsel for both parties herein, and acceded to by the Court, that the Jury may view the premises where this accident involved in this case is said to have occurred, and the Court thereupon charged the jury as follows, to-wit:

"Ladies and Gentlemen of the Jury: Before the case proceeds any further it has been agreed upon by the counsel on both sides, with the approval of the court, that you should have a view of the place where this accident occurred. This view is not given you to be considered as evidence in the case. Of course, you could not put that evidence into the record—but to enable you perhaps to understand better the testimony of the witnesses and the diagrams and maps that have been introduced in evidence. The law provides that the jury may have such a view during a trial. You will go there in a body under the general supervision of the court constable, and automobiles, of course, will take you there; and I trust it may be beneficial in enabling you to better understand the evidence and possibly the maps and diagrams mentioned in the case. While in your absence you will permit no one to address you about the case or discuss it in your hearing. To this rule there are these apparent exceptions: Possibly the representatives of both sides in the case may want to accompany you or be present at the view, and if they should desire the court [fol. 93] constable to call your particular attention without any comments whatever to something in the locality which you are especially desired to observe and fix in your minds, the constable, at the request of the party may do so and direct your attention without indication of what is expected to be proved in that connection.

It is not very far from here as I understand, and it will not take you long to make that inspection. After that is done you may return here and probably will have no difficulty in returning to the court room at the usual hour of 1:15, and come here as near to that time as you can, and we will resume at that time.

Mr. Blakely: I have noticed at different times when views have been taken that the jurors, innocently, of course, occasionally ask questions of some of the attorneys who may be present on either side. It is embarrassing to the counsel on both sides, because that being of course the rule that is laid down; but I think if that could be especially suggested to the jurors, that all communications will be through the bailiff. I think your Honor has already stated it, but I desire to call particular attention to it.

Mr. Anderson: For instance, some juror may ask some question of the bailiff and the attorney for one side and the attorney for the other may agree that it should be an- [fol. 94] swered.

Mr. Blakely: And if they do not agree, it should not be answered.

The Court: I believe the jury understands what has been agreed on and I will turn the jury over to the bailiff now.

Thereupon, the jury was taken under the supervision of the Bailiff to view the location at which the accident involved herein occurred, and thereafter returned to the court room, and the trial of said cause was resumed.

[fol. 95] C. L. Fisher, being recalled for further examination on behalf of the plaintiff, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Mr. Fisher, I forgot to ask you a couple of questions when you were on the stand before. The map that has been introduced in evidence shows a grade coming to that crossing, and the crossing and going on down—this train to some extent at least was going down hill—down a little grade. What are the rules, if you know, of the company in operating a train in a way to save power in a movement of that kind?

Counsel for defendant objected to the question. The Court sustained the objection.

Q. What is customarily done—to use steam under that situation, or the use of gravity, which is it?

A. Well, it is customary to save coal whenever you can.

Q. Where a train is moving, we will say—of thirty-two cars, the length of this train—a train of this description, we will say—in reference to noise, does it make noise or not? Describe that to the jury.

A. It makes no noise as far as that is concerned except the rolling of the engine and the exhaust of the steam through the stack.

(No cross-examination.)

[fol. 96] Lee Anna Meredith, being recalled for further examination on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Anderson:

Q. When you were on the witness stand you were asked certain questions about your former testimony that was given the other day in your case. Now, please tell us so there will be no question about it—how soon after you felt this jolt was it that you got hurt?

A. Right then.

Q. Before you felt the jolt on your automobile were you injured at any time?

A. No sir.

Cross-examination.

By Mr. Nolan:

Q. Do you recall the instant that the tender came in contact with your automobile?

A. Yes sir.

Q. What direction was your automobile headed at that time?

A. Towards town—south.

Q. Did that produce any jolt?

A. No.

Q. None at all?

A. They started to carrying it down the track.

Q. When some part of the tender came in contact with your automobile was there any jolt?

A. Well, when the tender hit the car.

[fol. 97] Q. You felt that?

A. Yes sir.

Q. You mean that there was not a jolt of any kind during the distance your automobile went down the track until the train stopped, is that what you mean?

A. Yes sir.

[fol. 98] Mrs. MAYME F. MEREDITH, the plaintiff herein, being first duly sworn, testified in her own behalf as follows:

Direct examination.

By Mr. Anderson:

Q. Your name?

A. Mayme F. Meredith.

Q. You are the plaintiff in this case?

A. Yes sir.

Q. Your whole family consists of mother, father and two children?

A. Yes sir.

Q. A boy and a girl?

A. Yes sir.

Q. Is the boy older than the girl?

A. Yes.

Q. Your home is down there on this road near the Park some place, is it not?

A. Yes; on the Hardy Road.

Q. Are there many automobiles that go past on that road?

A. Yes; very many.

Q. How old are you?

A. I was 40 this last September.

Q. Before this accident had you driven an automobile?

A. Yes.

Q. For how many years?

A. About ten, I believe.

[fol. 99] Q. Had your daughter driven, so far as you know, an automobile, before this accident?

A. She had.

Q. This was a left-hand control; that is, you sat on the left hand side of the car?

A. Yes.

Q. Behind the steering wheel.

A. Yes sir.

Q. It was a two seated car?

A. A two seated car.

Q. You were familiar with this road and this crossing, were you not?

A. Yes sir.

Q. And had been for a long time before this accident?

A. Yes sir.

Q. About what time of the day did the accident happen?

A. Between three and four.

Q. What kind of a day was it?

A. A nice, bright day.

Q. Were you in any hurry where you were going that day?

A. No sir.

Q. As you approached this crossing, you may state whether or not there is an apple orchard to your left?

A. Yes.

Q. And that apple orchard extends back some hundreds of feet from the crossing, does it not?

A. Yes sir.

Q. Of course, you knew that too?

[fol. 100] A. Yes sir.

Q. It is just a little up-grade to the railroad tracks, is it not?

A. I think it is a slight grade there.

Q. The road is straight and practically level from your home to the railroad tracks, isn't that true?

A. Yes sir.

Q. It is an improved, macadamized road?

A. Yes sir.

Q. Now, as you came to the orchard and started to pass the orchard, how fast were you moving?

A. About twenty or twenty-five miles an hour, I should think.

Q. You may state whether or not, after that, as you went on down toward the railroad tracks, you looked to your right?

A. I looked.

Q. Is that before you looked to your left?

A. Yes.

Q. Why did you look to your right before you looked to the left?

A. I could see much further. There is no obstruction on the right.

Q. You could look down the track to your right?

A. Yes.

Q. Was there any train there at all?

A. No sir.

Q. You may state whether you looked and listened for a [fol. 101] train at that time?

A. I did.

Q. By the way, speaking of listening, were the windows of the front of your automobile up or down?

A. They were down.

Q. They were open, were they?

A. Yes sir.

Q. Was your sight or ability to see and hear limited or obstructed by any glass or anything of that kind?

A. I had a clear view.

Q. Nothing to prevent your seeing and hearing, was there?

A. No.

Q. Did you look to your left?

A. Yes sir.

Q. Now, after you went on down on to the railroad tracks, you may state whether or not you reduced your speed?

A. I slowed down.

Q. After you got past the orchard give me your best judgment as to how fast you were going then?

A. I was practically stopped.

Q. Now, Mrs. Meredith, I understand you to say you knew of that crossing?

A. Yes sir.

Q. And you knew of the orchard?

A. Yes.

Q. You knew the physical situation there and have known it for a long time?

A. Yes sir.

[fol. 102] Q. You may state whether or not you were listening and using your sense of sight as you went down there to discover the presence of any train?

A. I was.

Q. Was there any whistle?

A. No.

Q. Was there any bell?

A. No.

Q. When you looked to the left, what did you see, if anything, in the way of a train?

A. I saw a train right on the track, and we were right there at the same time.

Q. Then what happened? Explain to the jury just what happened?

A. We were hit and there was a jar, and the door slightly fell open on the right, and I grabbed my daughter with my right hand.

Q. Explain just what happened next. Just the next thing. I want to ask you again if the automobile was carried on the train. Was your automobile struck?

A. Yes.

Q. Were you on the crossing at the time your automobile was struck?

A. I was right on the crossing.

Q. So far as you could tell—of course, I understand the situation, but so far as you could tell, where was the automobile struck—at one end or the other end or in the [fol. 103] middle?

A. Right near the driver's seat.

Q. And was your automobile carried on the back end of the tender, as the train moved?

A. It was pushed along.

Q. Now, tell the jury, after your automobile was struck and you were being carried along on the tender, just what position you were in, and what position was your daughter, and where your hands were and things of that kind.

A. As we were hit, it tipped it just a little, slightly, to the right, and the right door flew open, and I grabbed on to my daughter with my right hand and was hanging to the wheel with my left, and it was pushed down on the track, and we were screaming all the way down, and we went down the track a great distance, when there seemed to be an obstruction and it gave a jar, and I held on to my daughter and myself, and the car seemed to go over on its side, and at that time was when my leg was caught.

Q. Describe to the jury if you please, Mrs. Meredith, that which your daughter described as a jolt or something—describe that to the jury in detail, please.

A. It was a severe jolt, and as it went over it seemed as though there was something dragging us, and we went a few feet.

Q. And all the time, from the crossing up to this time of the jolt, were you injured at all?

[fol. 104] A. No sir.

Q. Was your daughter injured at all?

A. No sir.

Q. What happened right after the jolt?

A. Right after the jolt it seemed as if we were just drawn right under—as though there was something creeping right up on our body.

Q. Tell the jury what happened to you right after the jolt.

A. That was when my leg was caught and when they came down to try to get me out.

Q. Tell the jury how you got hurt, if you can. I don't know whether you can or not—tell the jury.

A. I know they put a tourniquet on my leg, and severed my leg right at the time.

Q. Did you hold on to your daughter before you got down to where the jolt was?

A. Yes.

Q. For all the distance that you went, did you have hold of your daughter?

A. I had hold of her to the very last.

Q. With which hand?

A. My right hand.

Q. What did you do with your left?

A. I had hold of the wheel.

Q. At that time, was the floor of the automobile level or was it tilted one way or the other, and if tilted in which [fol. 105] direction was it tilted?

A. It was tilted toward the right.

Q. In the position that your daughter was in and that you were in, where you were sitting, was it higher than she was?

A. Yes.

Q. So there will be no question about it, let me ask you again, did you remain in that position until the jolt?

A. We remained there until the jolt.

Q. Were you screaming?

A. Very much—screaming for them to stop.

Q. Before this accident, Mrs. Meredith, were you, so far as you know, strong and healthy and all right physically?

A. Yes sir.

Q. Before the accident?

A. Yes sir.

Q. Now, where were you taken after they got you out—where were you taken?

A. We were carried out along the tracks and put in an ambulance and taken up to the hospital.

Q. Where is that hospital located, here in Painesville?

A. It is on Liberty Street and Washington.

Q. How long did you remain by reason of your injuries in the hospital?

A. Three months and a half.

Q. And who was your principal doctor or your attending [fol. 106] physician at that time?

A. Dr. Carmody.

Q. What other doctors, if any, saw you? I mean, professionally, while you were in the hospital?

A. Dr. Haffner came in occasionally, and Dr. Campbell, from Willoughby.

Q. Of course, you had an operation. Did you have more than one operation at any time, or do you know?

A. At the time I went in, they called that one; and there was another one where they cleansed the leg.

Q. The first operation you had was taking the leg off. By the way, was there any leg left, or what about that, I don't know.

A. There was still a portion of the leg left on, but it was terribly crushed and had to be taken off.

Q. How many inches have you from your hip down to the end of your right leg?

A. Six and a half inches.

Q. Do you wear an artificial leg?

A. Yes.

Q. In reference to the leg that you have lost—do you experience anything at different times, as if something was the matter with the foot that is not on?

A. There are those contractions, and I feel as though they were on at times.

Q. Tell the jury about this feeling, as if there was something the matter with the foot—I mean the one that was injured.

[fol. 107] A. There is considerable contraction there and I feel as if it is drawing the toes right under, and feel as though if I could straighten the toes out it would relieve it.

Q. Within the past year have you experienced this?

A. Yes sir.

Q. How frequently?

A. Change of weather makes quite a difference, and at times at night.

Q. To what extent, if any, do these feelings interfere with your well-being? What effect have those feelings upon you, as if something was the matter with your foot?

A. It makes me very nervous, and it is a painful feeling, very hard to describe.

Q. Now, I am going to ask you with the kindly permission of the court to remove your artificial leg. I want the jury to see it. Your other leg, to what extent was that hurt, if you know?

A. It was terribly bruised and the flesh was all torn out up in this part.

Q. Tell where it is on your leg, your own jestures won't get in the record.

A. About four inches from my waist, it is all injured from there to above my knee; and that was all taken out, until it was from three-quarters of an inch to an inch and a [fol. 108] half deep.

Q. What was the extent, if you know—I mean from what you saw, not what anybody told you—what was the extent which you described first?

A. The nearest I could explain, it looked like a large piece of beef steak—just like a large steak.

Q. Was it very painful?

A. Very agonizing.

Q. Can it be possible on a case of this kind—it is all right, is it not, to let the jury see that leg? With the permission of the court, will you sit around?

(Thereupon, with the permission of the court, the plaintiff's left leg was exhibited to the jury.)

Q. Mrs. Meredith, of course the condition that you showed the jury, of your leg, was what was made there two years ago, the 19th day of July?

A. Yes sir.

Q. Now, that scar tissue—state whether or not—of course that does not form right away—describe to the jury the condition of that wound from the time that you had it until the present time?

A. Well, it is hard to describe it. I did not look at it for a long time afterwards. The first time I looked at it, it was just like a deep hole, and it did a lot of sloughing off, and it was over a year before it was completely healed.

[fol. 109] Q. Did the doctor resort to skin grafting?

A. Yes.

Q. Tell us about it, please.

A. There was seven pieces of skin graft put on.

Q. Where did they take it from?

A. They took it off of his hip.

Q. At any time was there any running sore there?

A. It discharged up until the time it healed, and that was over a year.

Q. Mrs. Meredith, tell the jury, in the last two or three months what pain, if any, you experienced by reason of that part of your body which you showed to the jury?

A. I had trouble with my knee. It gives me a lot of pain and it will give out from under me if I am not watching my step or am on it for any length of time, and I feel contractions or flexions of the muscles in the lower part of my leg, and at nights I wake up and have to cry out with the pain, and have to rub or massage it down until the contractions let go.

Q. Do you use crutches some?

A. Yes sir, I do. I use crutches when I don't have my limb.

Q. Why do you use a cane?

A. On account of lack of strength in my good leg, as you might call it.

Q. State whether or not you can get around to any extent without the use of a cane?

A. I cannot get around at all.

[fol. 110] Q. Tell the jury whether within the last six or seven months you have noticed any improvement in your condition?

A. No; I don't think I have in the last year. I have suffered more than I have all the rest of the time.

Q. What trouble do you experience, if any, in getting around? Do you have to have assistance as you have here in court?

A. If I am in the house where I am sure I can catch to something I feel secure; but I could not attempt it out anywhere.

Q. This lady that assists you, I don't know her name—who is that?

A. Mrs. Sidley?

Q. Who is she?

A. She is a nurse.

Q. I forgot to ask you, Mrs. Meredith——for how long did you have a nurse after you got home?

A. Something better than 16 months. That is, not the full length of time. I have had a nurse up until the last day of May.

Q. What have you noticed, Mrs. Meredith, if anything, in reference to any change, whether you have become more nervous or less nervous, or what about it? Tell us as best you can about your neurotic condition.

A. Well, I did not use to think I had any nerves, but now I am nervous, and I cannot sleep at night.

Q. Can you dress yourself without assistance?

A. I can, practically, now.

[fol. 111] Q. Does it take long?

A. Yes, it takes quite a while.

Q. Tell the jury what trouble you have in dressing yourself and taking care of yourself.

A. I have to use the crutches to get around when I haven't the leg. There are a good many stockings that you wear. A leg shrinks considerably after it has been amputated, and you have to wear wool stockings on that, and it takes quite a long time to get dressed.

Cross-examination.

By Mr. Blakely:

Q. Mrs. Meredith, you and your family have lived down there in the house on the Lake, either summers or all of the time, for the past ten years, have you not?

A. I don't know just the time; it has been a number of years.

Q. Is that substantially correct?

A. I would say about seven—seven or eight.

Q. Seven or eight years that you lived down there before the accident?

A. I think that is not all the time.

Q. Well then, say five years. You were very familiar with this railroad crossing, were you not?

A. Yes sir.

Q. And you were very familiar with the fact that this orchard was there on the east side?

A. Yes sir.

[fol. 112] Q. You had driven over that crossing a great many times?

A. A great many times.

Q. I think you said on the trial here the other day that you had driven over it on an average of once a week?

A. I think you asked me the average in the year that we lived down there, and I said on an average of once a week. We did not live there all the year around.

Q. The time that you were living there you averaged about once a week, is that right?

A. I think it was oftener than that.

Q. You answered an average of once a week and you referred to the time that you were living down there at the Lake?

A. I took the question—you asked me at an average that I crossed it in the time that we were living down there.

Q. And you said "once a week" is that right? I think we understand each other, Mrs. Meredith; during the summer time you lived down there, did you not—did you not live down there in the summer season—and you had for five years, whatever that period is—five years or more—and you averaged about that often passing over the crossing, is that right?

A. I don't know whether I just understand you or not.

Q. During the summer time you lived down there for five years, we will say, prior to the accident—during the summer?

A. Yes sir.

Q. And during that time, did you testify in the hearing [fol. 113] the other day, that you had averaged about once a week in passing over that crossing?

A. During the time I was down there, yes.

Q. And of course you knew that trains were operated over the crossing?

A. Yes sir.

Q. And of course you were down there not only during the time when you lived there, but I think you also stated that you had been down there for years previous to that going to the Park and going down to the Lake or in that neighborhood?

A. Yes sir.

Q. Now, there was, as you approached the crossing on the day of the accident over on the west side of the road—there was a railroad crossing sign, was there not, in yellow—a short one, some four or five feet high, by the side of the road?

A. There was.

Q. It was there, was it not?

A. It was.

Q. Did you see that that day?

A. I don't know as I saw it or noticed it that day.

Q. There was a railroad crossing sign which was maintained by the railroad company itself, when you got something like 27 or 28 or 29 feet from the north rail, was there not?

A. There was one there; I don't know just the distance.

[fol. 114] Q. There was one there that day?

A. Yes sir.

Q. With cross arms that called attention to the fact that it was a railroad crossing?

A. Yes sir.

Q. Did you see that that day?

A. It was there and I saw it.

Q. Take this photograph marked "Defendant's Exhibit B" and state whether or not that was the sign that was there on the day of the accident—the sign that appears in that photograph?

A. Yes.

Q. Now, this was a Packard car that you were driving?

A. Yes.

Q. How many years had you driven that car?

A. We had had it about a year.

Q. And you had driven cars ~~before~~ that time, Mrs. Meredith?

A. Yes.

Q. Did you start driving this car shortly after you got it—after Mr. Meredith got it?

A. Right after he got it, yes.

Q. So that you were familiar with the car?

A. Yes.

Q. It had four wheel brakes did it not?

A. Yes.

Q. Were the brakes in good condition?

A. Yes.

[fol. 115] Q. Then, going at a low rate of speed, you could stop the car very quickly, could you not?

A. I think so.

Q. On this occasion you started to slow down, I understood you to say in answer to Mr. Anderson, before you arrived at the track?

A. Yes, I did.

Q. You were going how fast before you started to slow down?

A. About 20 to 25 miles an hour.

Q. Is that your estimate or did you look at the speedometer?

A. It is my estimate.

Q. And your daughter was in the car on the seat at your right?

A. Yes.

Q. Was she playing a ukulele as you came up, or banjo, or something of that kind?

A. No sir.

Q. You had a musical instrument in the car?

A. I had two of them.

Q. What was the purpose of them?

A. We were going to a party that night and I was asked to bring them.

Q. Did you testify in the last hearing that you were going to the store?

A. I was going to the store.

Q. That was your immediate purpose—to lock up the store for the night?

[fol. 116] A. I was going to close up at 5:30—to be there when it closed.

Q. Your husband ~~was the~~ owner of the store?

A. Yes.

Q. And you were doing that for him?

A. It was for both of our interests.

Q. Now, you were going 20 to 25 miles an hour. How far back from the railroad track did you start to slow down?

A. I cannot say exactly. I should judge around two hundred feet.

Q. When you were 200 feet back, from that time on you were reducing all the time?

A. Yes sir.

Q. When you were 100 feet away, at what rate of speed were you going?

A. I could not say.

Q. Approximately, Mrs. Meredith. I don't believe you could tell exactly.

A. I don't think I could say just exactly.

Q. You approximate it at 20 to 25 miles an hour at 200 feet away—what would you approximate it 100 away?

A. I could not say; I was slowing down all the while.

Q. Would you say you were going more than 10 miles an hour?

A. I would not want to say.

[fol. 117] Q. You would not want to say that you were going more than ten miles an hour at that time?

A. I don't know; I kept slowing down all the time.

Q. As far as you are able to estimate it, Mrs. Meredith, tell what rate of speed you were going—when you came to 100 feet away from the crossing would you be able to testify that you were going more than ten miles an hour?

A. I would not be able to say at what speed. I know it slowed down to practically a stop at the crossing.

Q. Did you slow down gradually about the same all the way?

A. I kept slowing all the while.

Q. When you were one hundred feet away you would be down to about ten miles, wouldn't you?

A. I could not say.

Q. When you came to the crossing, I think you said just before you went on it you thought you were going about two or three miles an hour?

A. Practically a stop.

Q. Didn't you say at the other hearing that you were going two or three miles an hour?

A. Yes; practically a stop.

Q. Now, you said, I think, that you looked to the right?

A. Yes sir.

Q. You glanced down there and saw no obstruction there. Did you glance quickly or not?

A. I glanced to the right and nothing came.

Q. Did you take a long look to the right or glance down [fol. 118] there and immediately turn your head?

A. I looked for a train.

Q. That is not answering the question. When you looked to the right, did you glance and seeing there was no train coming, did you immediately glance the other way?

A. I glanced to the right, and there was nothing coming, and I looked the other way.

Q. Immediately and quickly?

A. I don't know how quickly I looked, I looked for a train.

Q. That is not answering my question. Can you tell me whether after looking to the right you turned around to the other side and looked back towards the east?

A. I looked and turned my head back the other way.

Q. Now, at that time, when you turned back, as you say, the first you saw of this tender was just at the time that you were struck?

A. They were right there together, yes sir.

Q. So, when you looked to the left, the first you saw of the tender was just as you were struck, is that right?

A. Yes; just at that time.

Q. I think you testified on the other hearing that when you observed it, the tender was moving backward towards Fairport, and in a westerly direction?

A. Yes; in a westerly direction.

Q. With reference to when you first saw the tender was this question asked you the other day: Question "Where were you at that time with reference to the railroad crossing," and was your answer "Right on the track"?

[fol. 119] A. I think it was.

Q. And was this question asked you "You had not seen any part of this train until you were right there"; "as you say, right on the track", is that right?

A. I think so.

Q. Do you say or not that that was the fact?

A. That they were right there?

Q. Yes.

A. Yes sir.

Q. Was your answer to that question that I have just read that you did not see any of it until you were right there on the track?

A. I did not see any train.

Q. And is it a fact, Mrs. Meredith, that you drove all the way up on the right hand side of the pavement—did you go on your own side?

A. Yes sir.

Q. And did that mean that you were at the right of the center of the pavement?

A. Yes sir; on the right hand side.

Q. All the time to the right of the center—on your own side of the road?

A. Yes.

Q. And you were there at the time you were struck?

A. Yes sir.

Q. And the first time that you looked was when you looked to the right that you have told us about?

[fol. 120] A. No; I glanced to the left first. There was an obstruction—the trees there on the left side, and then I glanced to the right again.

Q. When you glanced to the left first it was while the orchard was obstructing your view?

A. Yes sir.

Q. And then the next time that you looked, you looked to the right and then back to the left as you have just described?

A. Yes sir.

Q. Did that constitute the times that you looked?

A. Yes sir.

Q. Going at two or three miles per hour, with those four wheel brakes on that car, within what distance could you have stopped the car?

A. I don't know.

Q. Well, you have driven that car for some time had you not—a year?

A. Yes.

Q. You could stop it almost instantly, could you not?

A. I don't know whether it would be instantly or not, it could be stopped quite quickly.

Q. You could stop within two or three feet, could you not?

A. I don't know in what distance it would stop.

Q. Would that be approximately correct—going two or three miles per hour, you could stop within two or three [fol. 121] feet?

A. I don't know.

Q. You have used those brakes have you not?

A. I have used them, but I don't know what distance; I know I have stopped quickly, but I don't know the distance.

Q. When you were going ten miles an hour you could stop within a very few feet, could you not—stop within ten feet could you not?

A. I could not say; I don't know.

Q. I take it the reason you did not put your brakes on that day to try to stop was that you did not see this tender until you were right on the track at the time it struck, is that right?

A. I don't know why I did not put the brakes on. It happened so quickly and so suddenly.

Q. You did not see that tender, even going at the rate of two or three miles an hour in time so that you could stop without being over on the track?

A. I did not see it until we were right together.

Q. Now, after you were struck, I think you have testified that the automobile tilted toward the west—the top tilted toward the west?

A. Slightly.

Q. When you were struck, you alleged, I think in your petition, that the train was going ten miles an hour?

A. Yes.

[fol. 122] Q. That was what you said in your petition, what you swore to, was it not?

A. Yes sir, it was.

Q. And when that tender struck your automobile it gave it a very severe jolt or crash, did it not?

A. It gave it quite a jolt.

Q. And jammed it in, did it not?

A. I think it did; I have not seen it.

Q. The tilting occurred at that time—the beginning of the tilt?

A. It tilted a little bit.

Q. And when it tilted, it slid you a little bit towards the side which your daughter was on, did it not?

A. I imagine I would slide down to a certain extent.

Q. And you put your arm around your daughter?

A. I grabbed on to her arm.

Q. And hung on while you were hanging on to the wheel with your other hand?

A. Yes sir.

Q. And it continued to tip further and further, did it not?

A. It tilted all the way to a certain extent down the track, but did not go completely over.

Q. It continued to get worse all the way until it tilted right over?

A. No.

Q. I don't mean it tilted all at once, but it began to tilt [fol. 123] and kept right on tilting from the very first?

A. It tilted more and more on a slant, and was on quite a slant going down the track.

Q. Didn't it continue getting worse all the time in that respect?

A. I think it kept tilting a little more, yes.

Q. Was this question asked you the other day "And that continued to tip, did it not, and the tipping increased the further along you went, did it not", and did you answer "It seemed that way"?

A. Yes sir.

Q. The door came off finally, didn't it?

A. The door disappeared. It came open at the very first.

Q. Were you asked the other day this question, "Let me understand you. I am not speaking of the door being open. I say it was at the time that the door came off that you started down the track", and did you answer "As we went down the track for such a distance we struck some obstruction, and that threw us down", and that was this obstruction which was where it occurred at the very last?

A. Yes.

Q. And was this question then asked you, "Was the door off at that time", and did you answer "I don't believe so"?

A. I probably did, I don't know.

Q. Was this in accord with the actual fact—these questions and answers that I have asked you today that I have read to you—were the answers that you gave correct?

A. Yes; I have no doubt.

[fol. 124] Q. Of course, you did not see any obstruction at that time, Mrs. Meredith?

A. What do you mean?

Q. You say that you think you hit some obstruction—you did not see any obstruction?

A. I did not see any obstruction but I felt a severe jolt, and we continued on a little further and went over and we were there in between the side of the car and the door.

Q. When the car stopped several men came and began trying to break in the car?

A. For some time—it seemed ages to me.

Q. And Mr. Doubledee—I think you know the conductor?

A. I did not know any of the men.

Q. You knew the conductor was there trying to get you out?

A. I did not know who they were.

Q. You have seen Mr. Doubledee here in court since—was Mr. Doubledee there working?

A. I did not recognize anyone there at that time. I know people were working there.

Q. Did you hear Mr. Nevanpera testify?

A. Yes.

Q. And was it a fact that Mr. Doubledee took his handkerchief and tied it around your leg and took a stick or some object, and made a tourniquet and tightened it?

A. Well, someone did that.

Q. Mrs. Meredith, I only have one or two questions more [fol. 125] and I will finish as soon as I can. I think you said that you have improved within the last year so that you could dress yourself?

A. I have improved, yes.

Q. And you spoke of, I think it was of your leg—that it pained you more this last year, is that because you have been trying to use it more to bring it back?

A. No; I think you misunderstand me. I did not say my leg pained me more. I have suffered more within the last year physically.

Q. You have tried to use your leg more this last year than before, is that true, to get around?

A. Yes.

Q. There is just one more question. In your testimony last week in your daughter's case, did you testify that the time that you first looked to see if the crossing was clear was as you estimated it, two hundred feet or more—perhaps two hundred feet?

A. I think probably I did.

Q. Is that correct?

A. Yes.

Redirect examination:

Q. Mrs. Meredith, your attention was called to this exhibit where it shows up the track in the direction that the train came from, the orchard and this signal post—those signal posts are shown there. This picture was taken only a few days after the accident. This shows the condition [fol. 126] at the time of the accident, so far as you know?

A. Yes sir.

Q. These signal posts with the cross arms in no way gave notice that a train would come, it only gave notice that the crossing was there?

Counsel for defendant objected to the question.

Q. Here is another picture, another exhibit—and you notice that this shows certain signal posts up there. They are not the same as the one that is shown here; they have been put in since?

A. Yes sir.

Q. And those posts that have been put in since, whenever a train approaches the crossing, a light flashes, isn't that true?

Counsel for defendant objected to the question.

The Court: I do not see that that is relevant in this case.

Mr. Anderson: If your Honor please, the jury has been down there. I don't want any mistake made, that this is the condition at the time of the accident.

Mr. Marshman: He has conceded that the flasher light was put in about two months ago.

Mr. Blakely: Yes; that was not there then.

[fol. 127] Dr. Roderick M. Campbell, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. What is your full name, please?

A. Roderick M. Campbell.

Q. Where do you live?

A. Willoughby.

Q. And your profession?

A. Physician and surgeon.

Q. For what length of time, Doctor, have you been practicing that profession as physician and surgeon?

A. Since 1916.

Q. In what colleges or college did you prepare for your profession?

A. Marquette University.

Q. Did you do hospital interne work?

A. Yes sir.

Q. And I believe you said before that you did some work for the army in your profession?

A. Yes sir.

Q. How long have you been in this county as a practicing physician and surgeon?

A. Since the war—1918 and 1919.

Q. Practically all your professional life?

A. Yes sir.

[fol. 128] Q. Did you have occasion in 1929, in the summertime, to see Mrs. Mayme Meredith?

A. I did.

Q. Professionally?

A. Yes sir.

Q. Why did you go to see her—who called you?

A. Dr. Carmody.

Q. You understood Dr. Carmody to be her family physician?

A. Yes sir.

Q. He asked you to assist in some work?

A. Yes sir.

Q. Where did you go to see her?

A. Up to Lake County Memorial Hospital.

Q. Did you understand there had been an accident that day, or the day before?

A. That day.

Q. Do you recall, roughly, about the time you got there?

A. I think about four o'clock in the afternoon.

Q. Did you see her before she got to the surgery?

A. Yes sir.

Q. And state, Doctor, whether or not she was taken immediately to the surgery as soon as you could get her there after she was at the hospital?

A. I saw her in the hall, I guess. They brought her right out there.

Q. What work did you do, Doctor?

A. I gave the anesthetic.

[fol. 129] Q. In giving the anesthetic you were at her head, of course?

A. Yes sir.

Q. And viewed the whole proceeding?

A. Yes sir.

Q. How long was she in the surgery at that time, substantially?

A. Probably about an hour and a half.

Q. Who were the doctors that were working there?

A. Dr. Carmody and Dr. Haffner.

Q. Dr. Haffner?

A. Yes sir.

Q. Tell the jury what you determined her condition to be.

A. She had a crushing injury of the leg.

Q. Which limb, do you recall?

A. I think it was the right leg.

Q. What was done to that crushing injury to the right leg?

A. The leg was removed.

Q. Do you recall how high?

A. Up here (indicating).

Q. Indicating how much of a stump, Doctor?

A. Well, about six to eight inches of stump.

Q. At the time you saw her was the whole leg on there or had it already been amputated?

A. Well, it was partly severed.

Q. Had been partly severed prior to that time?

A. Yes sir.

Q. And the condition at the point of severance was crushed, is that so?

A. You have to take a leg off a little higher. You have to [fol. 130] get a flap to cover the end of the bone.

Q. Describe why you have to do that, Doctor?

A. Well, to prevent infection. Some of these wounds are ground into the dirt and the tissues are badly crushed, and you have to get a flap surface to cover over the lower end of the bone.

Q. Did you find that condition of dirt in that particular case?

A. Yes.

Q. And what, in reference to cushion, Doctor, what did you do to make a cushion for the leg itself?

A. You have to use the flesh to make a cushion.

Q. You have to take the bone off further in?

A. Yes sir.

Q. What, in reference to her left leg, did you see, if anything?

A. I did not notice the left leg especially. It was probably draped.

Q. In other words, your attention was directed to the particular point that she was in there for, surgery?

A. Yes sir.

Q. When you were in there, Doctor, were you offered an opportunity to see the left leg?

A. I don't remember.

Q. How many times did you see her?

A. I probably saw her about three or four times while she was in the hospital.

Q. You understood here to be there about how long, Doctor?

[fol. 131] A. Well, I could not state; but it was a considerable time.

Q. You had a few patients at that hospital and that was the reason you kept in touch with her?

A. Yes sir.

Q. She had Dr. Carmody for her physician?

A. Yes sir.

Q. State whether or not an injury such as Mrs. Meredith had is attended with pain?

A. Well, the pain would vary. There would be some pain there, of course, yes.

Q. As time went on would it be painful or not?

A. All depending upon the results you get. There would be some pain, of course, if the nerve was exposed.

Q. Doctor, she states that periodically, with the weather, and at night, that there is a creeping sensation such as it is in cramp; will you explain what that might be?

A. Well, that is due to that amputation there—the nerve fibres of the nerves that go down to the foot, they, of course, run up into the upper part of the leg and you sometimes get a sensation that your toes might hurt or something like that and it is probably due to an adherence between the nerve and the rest of the tissue, of the flap.

Cross-examination.

By Mr. Nolan:

Q. The only time that you saw Mrs. Meredith was that day of the accident, at the hospital?

[fol. 132] A. Yes—and I saw here there several times.

Q. You afterwards made some observations?

A. Yes, at the hospital.

Q. In any of these observations did you notice whether or not the amputated limb had improved?

A. Well, it healed fairly well, I thought.

Q. You could get a cushion?

A. Yes, made a pretty fair cushion.

Q. Do you know whether or not she is able to use an artificial limb now?

A. I don't know for sure. I saw her out in the hall. I suppose that was what she had on.

Q. You gave the anesthetic in this case?

A. Yes sir.

Q. She was suffering from shock?

A. Yes sir.

Q. Did that call for close attention while you were administering the anesthetic?

A. Yes sir, to a certain extent.

Q. That was your job?

A. Yes sir.

Q. You did not notice the left leg at all?

A. I did not notice.

Q. The one that was not taken off, you did not pay any attention to?

A. No.

Q. Was there anything done to that leg in the surgery that day while you were there—the one that was not taken [fol. 133] off?

A. I don't remember of it.

Q. I don't know as I understood what you said—did you say the leg that was amputated, had the foot been entirely severed before she went to the surgery or not?

A. I think the reason for the amputation was an injury starting up above here.

Q. Whether or not the foot on that leg had been entirely severed or not before you saw her in the surgery you don't remember?

A. I do not recall that.

Q. Now this that you speak of, a person appearing to suffer where an amputation has been had, is due to the nerve in the flap where the amputation has taken place?

A. Yes sir.

Q. That is not severe pain, is it, Doctor?

A. Well, that might vary. Some people are more sensitive to pain than others?

[fol. 134] Dr. Ernest L. Haffner, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Give us your full name?

A. Ernest L. Haffner.

Q. Where do you live?

A. Fairport Harbor.

Q. What is your profession?

A. Practicing medicine and surgery.

Q. For what length of time, Doctor?

A. About forty years?

Q. In this locality?

A. No sir.

Q. For what length of time have you been here?

A. Seven years the first of June.

Q. Where did you prepare for the medical profession?

A. Missouri State University, St. Louis.

Q. You have done hospital work since that occasionally?

A. Yes sir.

Q. Some surgery?

A. Yes sir.

Q. Doctor, professionally, did you see Mrs. Mayme Meredith, the lady sitting here, after her accident?

A. Yes sir.

Q. How soon after her accident, do you know?

[fol. 135] A. I presume probably half an hour.

Q. Who called you?

A. Dr. Carmody?

Q. You understood Dr. Carmody to be her attending physician?

A. Yes sir.

Q. And he called you for assistance?

A. Yes sir.

Q. Both Mrs. Meredith and her daughter were in there at that time?

A. Yes sir.

Q. Doctor, where was she when you first saw her?

A. On the operating table in the hospital.

Q. Did you assist in the operation?

A. Yes sir.

Q. Describe her condition to the jury as you first saw her.

A. Her right limb was completely severed and the left limb was denuded from the hip joint almost to the ankle.

Q. When you use the term "denuded", what do you mean by that?

A. That the skin and the flesh were completely off and the muscles and flesh had been laid bare.

Q. And that was on the limb that was not severed?

A. Yes sir.

Q. How big an area on this left limb was laid bare and the muscles torn?

A. Some places between three and four inches wide and some places not quite so wide—from the hip joint to the ankle.

[fol. 136] Q. Now, Doctor, what was done in these operations—what work did you doctors do?

A. The right leg had been completely severed and we prepared a stump and brought the soft tissues back over the end of the bone to form a stump.

Q. Now, the right leg—was there any foot on it at the time you started your work?

A. No sir, that had been completely severed at the time I saw it.

Q. And what was done with the leg above the knee?

A. About the lower two-thirds of the femur had to be removed so as to get flesh enough to cover it. The bone was sticking out between the muscular tissues.

Q. You have to go back in further and take off the bone so as to form a cushion?

A. So as to have soft tissue to form a cushion over the end of the bone.

Q. She is now wearing an artificial leg?

A. Yes sir.

Q. The other leg, what did you do with that?

A. It had to be trimmed up and the debris removed as far as possible, and that leg was dressed.

Q. And what was in there—was there some foreign substance in there?

A. Yes, I did not pay much attention to what they were. Some seemed to be cinders and gravel and stuff.

Q. When you completed your surgical work I assume she [fol. 137] was taken to her room?

A. Yes sir.

Q. After that time did you have ocassion to see her professionally?

A. Yes sir, I saw here after that. There was quite a slough formed on that leg where the muscular tissues had been involved.

Q. Which leg was that?

A. The left one.

Q. Do you call that a good leg?

A. If you do you have a poor conception of a good leg.

Q. Now, on this leg there was a tearing off of some of the muscles?

A. No, I did not state that. I said the leg was torn. You could not call that an abrasion; it was cut and torn and burned—possibly from the scraping—a friction burn. It was not a cut and it was not a tear.

Q. What function does that part of the leg perform?

A. That depends upon what part of the leg you refer to. If you refer to where you have your thumb, the vastus externus, has the function of lifting the leg.

Q. Did this injury disturb any of the functions that you have described?

A. I could not say as to that. I would not answer that for this reason, that I have not seen Mrs. Meredith since the leg has healed up and for that reason I am not able to state whether it has lost the function or not.

[fol. 138] Q. State whether or not an injury of this kind it attended by a nervous shock?

A. Undoubtedly.

Q. Is that a thing that will probably continue for a time?

A. It is apt to.

Cross-examination.

By Mr. Nolan:

Q. You had not known Mrs. Meredith before this occasion, Doctor?

A. No sir.

Q. Who gave the anesthetic?

A. I think Dr. Campbell.

Q. Was he there before you or were you there first?

A. I could not state positively as to that.

Q. In the presence of Mrs. Meredith I mean?

A. I could not state positively. I think we both got there very near the same time.

Q. Have you made any observation as to the result of the amputation?

A. I saw her while she was in the hospital. I think she was confined in the hospital in the neighborhood of four months—possibly a little less, possibly a little more.

Q. How often did you see her in that time?

A. I would say possibly a dozen times.

Q. In those times did you observe the stump where the amputation had taken place?

A. I think I was in two or three times when Dr. Carmody dressed the other leg. I observed it more frequently than [fol. 139] that. Dr. Carmody asked me to go in and see the leg and say what I thought about doing certain things.

Q. Did you make any observation as to the stump?

A. From the operation that was done and from the results as I saw it I have every reason to believe she has a very fair stump.

Q. One an artificial leg can be used on?

A. Judging from the work, yes. From personal knowledge I do not have it.

Q. In your opinion that would be so?

A. Yes sir, that stump was fixed with the idea that she could wear an artificial leg on it.

Q. You saw the other leg very often while she was at the hospital and saw how it progressed?

A. Yes sir.

Q. At one time some sloughed flesh had to be taken off?

A. Yes sir.

Q. And was it in process of healing?

A. The last time I saw the leg it was granulating up and doing what I would say nicely.

Q. Leaving a scar?

A. There was some skin grafting done on that leg, too.

Q. Did you participate in that?

A. Yes sir.

Q. Where that leg was injured, as you observed it, was there a scar on it the last time you saw it?

A. Yes, scar tissue forming.

[fol. 140] Q. So if there is a portion of that other leg now between the hip, practically to the ankle, that has not any scar tissue on it, it would be your opinion that it was not injured?

A. Not exactly.

Q. What would be your idea?

A. It might be there was a complete healing all over without a scar being left.

Q. And as you recall it now, as you understand it, you have not seen it enough to know whether there is a loss of motion, or limitation of motion, and cannot express an opinion on that point?

A. No, I could not say to know.

[fol. 141] Dr. M. H. CARMODY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Your name, please.

A. M. H. Carmody.

Q. Your profession?

A. Physician and surgeon.

Q. Your residence?

A. Painesville.

Q. Of what school of learning are you a graduate?

A. Cleveland Medical College.

Q. How many years continuously have you been practicing your profession?

A. Thirty-four years.

Q. How many years here in Painesville and vicinity?

A. Thirty-four years.

Q. Are you married?

A. Yes sir.

Q. You may state whether or not you professionally saw Mrs. Meredith right after her injury?

A. I did.

Q. How soon after the accident did you see her first?

A. I don't know the exact time. Probably 40 or 45 minutes.

Q. Where did you see her?

A. At the Hospital.

[fol. 142] Q. For fear I may forget it—for how long was she a patient in the hospital after that?

A. About three months.

Q. Under the care of physicians and nurses and so on, Doctor?

A. Yes sir.

Q. You may state whether or not a daily record was kept called a hospital record?

A. There was.

Q. And have you had access to that?

A. Yes sir.

Q. You may state whether or not you had, partially at least, the making of that, or having it made under your jurisdiction?

A. It was under my jurisdiction. The nurses make it.

Q. Tell the jury as best you can, somewhat in detail, please, just the condition she was in, the extent of the injuries, when you first saw her?

A. She had arrived at the hospital a few minutes before I had and she was on a stretcher. Her clothing was all disorganized and dirty and greasy and full of cinders, and the right limb was severed about the middle of the thigh, and the flesh was all ragged and ground and crushed and full of cinders and dirt and grease and oil. The left leg was contused and bruised and there was a contusion right down the side of the leg from the upper third of the thigh down [fol. 143] to the middle of the lower leg. There was what we call a friction burn in the middle of the left thigh, of extensive size.

Q. Afterwards an operation on the right leg took place?

A. We immediately removed the right leg.

Q. Before that operation, describe to the jury the condition of the leg.

A. The flesh was all ground and ragged and hanging and bleeding quite profusely, and the bone was crushed.

Q. How much of the right leg remains since that operation?

A. There is about one third of the upper right leg.

Q. Did you perform the operation, Doctor?

A. I did.

Q. Who assisted you?

A. Dr. Haffner and Dr. Campbell.

Q. That was a major operation of course?

A. Yes sir.

Q. She was put under the influence of an anesthetic and so on, of course?

A. Yes.

Q. What is the condition of that leg where it has been severed, is there a cushion there—what condition is it in?

A. She has a very good cushion for an amputation.

Q. Do you think that in the future she will not require any more operations or have any more trouble so far as the amputated leg is concerned and the six inches of the leg that [fol. 144] remains?

A. There is no telling what might recur there; there may be some infection of the scar tissue; there may be some growth develop and it may become more sensitive and tender.

Q. The lady has told us about feeling pain and cramped conditions, which seems to her to be in the foot that has been amputated. Is it known to science that it happens that way sometimes?

A. We have those violent muscular contractions following any major amputation.

Q. Explain to the jury why a person losing a limb sometimes experiences that?

A. The muscles have no lower attachment, and there is a violent contraction of the stump of the muscle every little while, which causes severe pain.

Q. Of course those muscles and ligaments and nerves have been cut off, but that which remains of these ligaments and muscles and nerves, are not conscious, if I may use that word, of what has been taken away, is that true?

A. Yes sir.

Q. And that condition that you find there, that pain, that disagreeable sensation, will that continue in the future since it has continued for two years—what is the fact about that?

A. I think it will be a permanent condition.

Q. In what condition did you find the other leg that did [fol. 145] not need to be amputated? Tell the jury the condition of that leg when you first saw it.

A. Well there were extensive abrasions all up and down the thigh of the left leg, beginning close to the hip and extending down to the middle of the lower leg, and in the thigh here there was what we call a friction burn, where it has been rubbed along some surface to cause a burn of that extent, which penetrated very deep into the muscles.

Q. We have noticed, Doctor, that leg had certain hollows in the flesh and skin even now; but what was the condition at first in reference to those hollows?

A. There was an extensive abrasion, and this friction burn; the flesh was ragged and bleeding and full of dirt and cinders.

Q. Could you explain that to the jury a little better by showing the leg to the jury, Doctor?

A. Yes.

Q. All right, please do so.

Mr. Blakely: Your honor, we don't want to object to anything that is fair. This leg has been exhibited to the jury once. It does not seem to us to be fair that it be continued to be exhibited.

The Court: If they can bring the situation more clearly to the jury by the Doctor explaining the condition, I think they have a right to have it done.

[fol. 146] Mr. Anderson: We are not attempting to parade it before the jury.

Mr. Blakely: We made no objection to it being shown once, but we object to its being paraded before the jury again, and we except to the ruling of the court.

Thereupon the plaintiff's leg was exhibited to the jury.

A. This portion of the leg was completely stripped from this surface down to here, at various depths. This here is all scar tissue. There is a depression there varying from a quarter of an inch to an inch and a half deep.

Q. Doctor, about how long is that scar tissue, that is up toward the hip?

A. About twelve inches.

Q. And what is the average width?

A. About eight inches.

Q. What is the nature of scar tissue that nature forms —what is the nature of it?

A. Well, it is a hardened, dry tissue, that forms a scar. It is quite sensitive and poorly nourished.

Q. You may state whether the nerves have the same ability to convey motion, or to convey an impulse to the part of the anatomy where they have to pass through or are in scar tissue.

[fol. 147] A. The nerves in that surface have been destroyed.

Q. Doctor, what is malignant growth?

A. Malignant growth is cancer, commonly called.

Q. Unfortunately, the origin of cancer is not known to humanity as yet, is it?

A. We have no positive knowledge of its source.

Q. The germs are not isolated, if it is a germ disease?

Counsel for defendant objected to the question. The court overruled the objection. To which ruling of the court counsel for defendant at the time excepted. Counsel for defendant objected and excepted to this line of testimony.

A. No.

Q. Is there any danger in this leg that has been amputated of malignant growth in the future?

A. Malignancy is prone to develop in scar tissue, or following an injury.

Counsel for defendant moved the court to exclude the answer. The court overruled the motion. To which ruling of the court counsel for defendant at the time excepted.

Q. Is there any certainty about it?

A. There is not.

Q. Doctor, have you made an examination of this lady while you have had her under your observation for how long?

A. Two years last July when she was injured.

Q. You may state whether or not she is still within your [fol. 148] professional care? I don't know; I am merely asking you?

A. She is.

Q. Doctor, have you made an examination of her neurotic condition, nerves and so on—nervous shock?

A. I have treated her for her nerves.

Q. Examining the reflexes?

A. Yes sir.

Q. After examining the reflexes, and the opportunity that you have had for seeing her all this time, tell the jury what her nervous condition is today—whether she has experienced nervous shock, and tell the jury about it.

A. She is subject to hysteric spells every little while. The reflexes of the left leg are not entirely absent but they are very much reduced.

Q. The reflexes that you have examined, are they accelerated or absent or normal?

A. They are reduced.

Q. You know, Doctor, the history of this case. Would it be possible for a woman to have experienced what Mrs. Meredith has had without producing nervous shock?

A. I don't think so.

Q. Explain to the jury what you mean by nervous shock?

A. Well, a weakened nervous resistance following this injury.

Q. Is she still suffering from the result of this nervous [fol. 149] shock today?

A. Yes sir.

Q. What about the future, will she recover from it or not, considering that two years have passed and up to the present time?

A. Not permanently.

Q. What is your opinion as to whether the leg where it has been amputated, and the condition of the other leg—does it produce pain or does it not?

A. She gets those muscular contractions in the amputated leg, and the scar tissue is always sensitive.

Q. What do you say about the future, Doctor, will she recover to such an extent that she will not suffer pain—tell us about it please.

A. I think she will always have pain from both limbs.

Q. You notice that she uses a cane. Is it necessary for her to use a cane in your opinion?

A. Yes sir.

Q. She receives some assistance in getting around. Is it necessary? Does she need that or not?

A. She will have to have some assistance on account of the weakened condition of the left leg.

Q. Will she need assistance from other people in getting around to any extent as long as she may live?

A. Yes; she may require some assistance at times—not always.

[fol. 150] Cross-examination.

By Mr. Nolan:

Q. You cannot tell about that—about her needing assistance for all the years to come?

A. I cannot tell. The probability is she will.

Q. The history of things of that kind is the person improves with time—that the shock passes away—is that the history of it in your experience?

A. Not always.

Q. Well; frequently?

A. Sometimes.

Q. It is as likely as anything else, if the person is normal?

A. I do not call that leg normal.

Q. The general health is good, isn't it, aside from that?

A. Excepting the nervous condition.

Q. Was she your patient before this injury?

A. Yes sir.

Q. What was her condition of health then?

A. Very good.

Q. A person in good health as she was before the injury in your opinion as a medical man is quite likely to recover from nervous shock from an accident?

A. I don't think so—not completely, no.

Q. You think she suffers some pain and inconvenience—you don't put these two together, do you. You sometimes have pain without inconvenience?

[fol. 151] Q. Using an artificial leg would be inconvenient without suffering any pain. You do not mean to put the two together?

A. No sir, not at all.

Q. You say she has got healed where the amputation took place?

A. Yes sir.

Q. There is no reason for apprehending a breaking out in the future, is there?

A. As far as I am able to judge now, no.

Q. When you first saw her she was in the hospital on a stretcher?

A. Yes sir.

Q. When she was brought in she was as you saw her?

A. Yes sir.

Q. With her clothing disarranged and grease and oil——

A. Yes, and dirt and cinders.

Q. There was some grease on the clothing?

A. Yes; there was some oil.

Q. You noticed that when you looked at her?

A. Yes.

Q. Now, the skin on the other leg was scraped off on the outside of the leg over about two-thirds of the upper leg and down about half way on the lower leg?

A. Yes sir.

Q. And dirt and foreign matter of some sort got in there?

A. Yes sir.

[fol. 152] Q. And of course you had to remove that?

A. Yes.

Q. That recovered, Doctor, and healed up?

A. It did not for a long time.

Q. And finally healed up?

A. Yes.

Q. And left scar tissue?

A. Yes sir.

Q. And that is apparent now—whatever scar tissue was formed, when that healing took place, is apparent now from the view of the limb, is it not?

A. Yes sir.

Q. Isn't scar tissue supplied with nerves and circulation?

A. The circulation and nerve supply is very scant.

Q. But there is some?

A. Some.

Q. Is it sensitive to the touch?

A. At certain points.

Q. I mean this particular scar tissue?

A. Yes, certain parts of that scar are sensitive.

Q. Can you tell us which parts?

A. Right in the center, at the deepest portion.

Q. Why is that, if you know?

A. There are probably some nerve filaments involved in the scar tissue.

Q. You mean the end of some nerve there?

A. Yes sir.

[fol. 153] Q. And that creates a sensitiveness, when if it were struck or pressed on, it would cause pain?

A. Yes sir.

Q. This sensation of a person who has had an amputation such as Mrs. Meredith has—having a cramping of the foot or toes—that is due to what?

A. The nerve action on the stump; the dead end nerves.

Q. The ends of the nerves you mean?

A. The nerves that go down and supply the foot.

Q. Is that a periodical pain or a steady, constant pain?

A. That is not a pain, as you are talking; it is about the motion—the feeling.

Q. I guess you do not understand me, or I don't make myself plain. I understood you to say that a person who has had an operation such as Mrs. Meredith had, might have a feeling in the portion that has been amputated.

A. They don't feel the pain there, but they feel the foot and the motion and all that, as if it was there, and feel a muscular contraction.

Q. Is that your experience in the profession, that a person such as Mrs. Meredith, would have a sensation in the toes of the foot of the leg that has been amputated—cramping?

A. Yes, they feel that they can move them. Sometimes they experience pain with it, and other times as if it were in motion.

Q. Is that a sensation exactly as if the foot were there?

[fol. 154] A. Yes sir.

Q. Those things come at decreasingly rare intervals, or increasingly rare intervals, as time goes on?

A. As time goes on they may elimitate themselves completely, and I have known them when they went through life with them.

Q. It is a common experience in your profession that things of that kind disappear in time to a great extent?

A. Somewhat.

Q. Now, about her nervous condition. You say you tested her reflexes?

A. Yes sir.

Q. Which reflexes, Doctor?

A. The patellar reflex.

Q. That is the knee cap?

A. Yes sir.

Q. And that you get by striking the tendon just below the knee cap?

A. Yes sir.

Q. In a normal person, what do you get when you strike the tendon just below the knee cap?

A. You get a sharp reaction.

Q. How?

A. A kick of the foot.

Q. The foot moves out?

A. Yes.

[fol. 155] Q. That is one way in which you tell whether a person's nervous condition is in proper order generally, is it?

A. Yes sir.

Q. When you strike the tendon below the knee why do you get a movement of the foot?

A. The jerking of the patellar ligaments.

Q. Does it convey a message, so to speak, if you can describe it in that way, to a particular point in the spinal column?

A. Yes; there is a nervous reflex.

Q. And it comes back to the foot, is that it?

A. Yes.

Q. And in a normal person that reflex is always present, is it?

A. Yes.

Q. And if it is not there, what does it indicate to you?

A. Usually some type of paralysis.

Q. Did you find the patellar reflex in Mrs. Meredith when you made that test?

A. Yes—reduced.

Q. You mean the motion of the foot was less than you would consider normal?

A. Yes.

Q. There is some motion in the foot?

A. There is some reflex action of the foot.

Q. You think it is deficient, do you?

A. Yes sir.

[fol. 156] Q. Can you indicate to the jury in any way to what extent this reflex is deficient?

A. It was probably 75 per cent deficient.

Q. 25 per cent normal?

A. Yes sir.

Q. How lately did you test that reflex?

A. We tested it at Dr. Spence's office two weeks ago.

Q. There were other doctors present at the time that had the same opportunity to observe it that you did?

A. Yes sir.

Q. Did you test any other reflex?

A. Not at that time.

Q. Did you at any other time test any other reflex?

A. The plantar reflex.

Q. Where are they?

A. At the bottom of the foot.

Q. They indicate what?

A. The absence of nerve supply.

Q. If there were trouble in the nervous system would that particular reflex give you any indication where it was?

A. Only in the nerve supply to the limb.

Q. How long since you made that test, Doctor?

A. Sometime during the summer—within two months.

Q. Do you know whether Mrs. Meredith has increased in weight since the accident?

A. I would say she has.

Q. She is somewhat heavier?

[fol. 157] A. Yes sir.

Redirect examination:

Q. You could only test the patellar reflex in one leg?

A. Yes sir.

Q. The other leg was gone?

A. Yes sir.

[fol. 158] LIFE EXPECTANCY

Mr. Marshman: I want to read into the record the expectancy of life.

I read from the Ohio Statutes. The expectancy of life of a female 38 years of age in the Carlisle Table is 28.96 years; in the American Experience Table 29.62 years, and in Thirty Offices' Experience 29.81.

Thereupon the plaintiff rested and the above and foregoing with the exhibits hereto attached is all the evidence offered or introduced by the plaintiff in chief on the trial of said case.

[fol. 159] DEFENDANT'S MOTION FOR DIRECTED VERDICT

Thereupon, after the plaintiff had rested her case and before introducing any evidence on behalf of the defendant, counsel for defendant moved the court to instruct the jury to return a verdict in favor of the defendant herein.

On consideration whereof the court overruled said motion. To which ruling of the court counsel for defendant at the time excepted.

DEFENDANT'S MOTION TO WITHDRAW JUROR

Mr. Blakely: Let the record show that at this time the defendant called the attention of the court to certain acts of one or more of the jurors and charged misconduct on his or their part and requested the court to withdraw a juror and continue the case, which motion was overruled and the defendant duly excepted.

[fol. 160] **Herman L. Mantle**, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. Your name is Herman L. Mantle?

A. It is.

Q. Where do you live, Mr. Mantle?

A. Painesville Township Park Road.

Q. How far from Painesville city?

A. About half a mile from the corporation line.

Q. What is your business?

A. Fruit farming.

Q. How long have you been in that business?

A. Twenty years.

Q. And how extensively have you conducted that business?

A. We have about one hundred and eighty acres of orchard.

Q. And what kind of orchard?

A. Apple and peach mostly.

Q. Now, you have a small orchard down on Hardy Road, about three-quarters of a mile south of the lake at the point where the Hardy Road and the right of way of the F. P. & E. Railroad Company intersect?

A. We do.

Q. That is the orchard which is upon the north-east corner of that intersection?

A. It is.

[fol. 161] Q. Is that a young or old orchard?

A. It is about fifteen years old.

Q. Now, Mr. Mantle, at any time did you examine the trees of that orchard—any of the trees—with reference to the growth which had been made in the last two years, the last two seasons of growth?

A. I have.

Q. And did you make that examination, or those examinations, within the last week or two?

A. I have.

Q. Among those examinations what is the fact as to whether the corner tree—the one nearest the railroad—the nearest of those trees—was examined?

A. It was.

Q. And did you examine any others to the north of that place?

A. I did.

Q. I am speaking now, Mr. Mantle, with reference to the growth of the limbs of the trees. What did you observe when you made your examination as to the growth of the limbs of those trees?

A. How far back—over what length of time?

Q. Over the period of the last two years.

A. The average terminal or length growth was about two feet and a half—some longer and some shorter.

Q. What was the shortest that you noticed of that two years growth?

A. About a foot and a half.

[fol. 162] Q. That would mean that the diameter of those trees on an average was increased by about five feet, would it not?

A. It would.

Q. In circumference about fifteen feet or more?

A. Approximately so.

Q. During this period of time—speaking, Mr. Mantle, of the last two years of growth?

A. That is as I understand the question.

Q. How do you determine the growth of a tree, Mr. Mantle, the growth of the branches—is there something there which shows distinctly each years growth?

A. There is a mark where the growth stops and starts each growing season.

Cross-examination.

By Mr. Marshman:

Q. Mr. Mantle, at the time of this accident were you aware of the fact that your trees projected over the right of way of the railroad company?

Counsel for defendant objected to the question. The Court overruled the objection; to which ruling of the Court counsel for defendant at the time excepted.

A. I was not.

Q. You know it now, don't you, sir?

A. Yes.

Q. You were a witness in this case last week, Mr. Mantle?

A. Yes sir.

Q. You testified, didn't you, that shortly before this case [fol. 163] was started, that you had cut the growth in your orchard—is that so?

A. I don't remember that testimony.

Q. Didn't you do that, sir?

A. I don't quite catch your question.

Q. Your apple orchard abuts the right of way of the railroad and also Hardy Avenue at the scene of this accident?

A. Yes.

Q. There was a certain growth in between the trees. Wasn't that cut just a short time before this first trial of Lee Anna Meredith, last week?

A. Yes, we cut the cover crop; but that is just orchard practice, that is all.

Q. You cut it just a few days before that trial—that is not orchard practice, is it?

A. I beg your pardon; I think it was.

Q. Were you down around the scene of the accident any of the days within a week before last Monday when this first trial started?

A. Let me get that again.

Q. Let me put it this way. This first trial started a week ago this Monday?

A. Yes.

Q. A few days before that were you down there in your orchard there at that corner at any time?

A. I passed there; I was not making any close observations.

Q. At that time did you see the railroad men cutting the weeds along the right of way of the railroad?

[fol. 164] A. I did not.

Q. Did you on the Saturday before the Monday that this trial started a week ago, see any railroad men doing any work of filling in ground around that crossing?

A. No.

Q. You did not see any work there at all?

A. No.

Q. Along the east side of Hardy Road approaching that crossing you have an apple orchard, haven't you?

A. Yes.

Q. After this accident weren't there trees cut down along the road to the immediate left as you approach that crossing from the north, between the apple trees and the road?

A. Yes.

Q. How long after this accident were those trees cut down?

A. They were cut down about the 1st of February, 1930—last year.

Q. Will you describe the types of those trees?

A. They were shade trees that had grown there for a number of years before that; they were of various varieties—ash, elm and so forth.

Q. About how many in number, roughly?

A. Twenty.

Q. And those trees, if I understand you correctly, Mr. Mantle, were much closer to Hardy Road than your apple orchard trees?

A. They were closer, yes; about where the old fence [fol. 165] stood before we took the fence out.

Q. How close up to the north rail of the tracks did they extend?

A. Of course, they went all along the highway from the end of the orchard over towards the lake—and the nearest tree to the railroad, if that is your question——

Q. That is right.

A. Perhaps sixty or seventy feet from the rails.

Q. When we went down there, Mr. Mantle, we saw a stump of considerable size; is that where one of the trees was that was there?

A. There is a stump there of one of those trees.

Q. About a two foot and a half stump?

A. I suppose you mean the stump nearest to the railroad track.

Q. That was cut down since the accident?

A. Yes sir.

Q. How high was that compared with the trees in the apple orchard?

A. Much higher.

Q. You have a young man working for you that was up here as a witness the other day, Mr. Mantle?

A. Yes.

Q. What is his name?

A. Merle Pitman.

Q. What was the first time that Merle ever told you that he knew anything about this accident?

Counsel for defendant objected to the question.

The Court sustained the objection.

[fol. 166] Q. Mr. Mantle, in explaining this to me as an orchard man—in the growth of trees, as the tree grows do the limbs go up higher or do they stay at the same place?

A. It continues down where it was and the increase in the growth is in the end of the limbs.

Q. The trees that were cut down, were they alive or were they dead trees?

A. They were alive.

Redirect examination:

Q. Mr. Mantle, will you kindly step this way. This map is on a scale of one inch equals ten feet; and will you take that stump which appears upon this map, which is marked "Plaintiff's Exhibit 1", and tell me, if you please, the distance that that stump is from the railroad track?

A. Eighty-five feet.

Q. This is the first stump to the north of this track, is it not?

A. Yes sir.

Q. And was that one of the trees which you cut down a year and a half ago, whenever it was?

A. Yes sir.

Q. Tell us about the limbs of that tree—were they low down or high up, or how?

A. They were high up.

Q. Were the limbs of that tree low enough down to interfere with the view of the railroad track as you approached it?

Counsel for plaintiff objected to the question.

[fol. 167] The Court overruled the objection; to which ruling of the Court counsel for plaintiff at the time excepted.

A. They were not low enough.

Q. How many feet would you say they were from the ground, or above the level of the pavement put it.

A. Eight or ten feet.

Q. That was the first tree—the nearest tree there was to the railroad track, was it not?

A. Yes sir.

Q. These trees that you have spoken of extended all the way from here down toward the lake, did they not?

A. They did.

Q. I overlooked asking you this question on direct examination. Did you trim those trees in the last two years?

A. Yes.

Q. When?

A. They were trimmed in March of this year, I think that was the month it was, during the past winter.

Q. And you cut off this growth of the ends of these apple trees?

A. Not much; mere thinning.

Q. The growth that you have testified about on direct examination is the growth which is still left after the trimming as compared with two years ago, is that right?

A. Yes, that is right.

Q. This cover crop that has been spoken of—what kind of a crop was that?

[fol. 168] A. Clover.

Q. That was the covering crop that you cut this year?

A. We planted it in May and cut it down then.

Recross-examination:

Q. What makes you think that the stump shown on that map is the closest stump to the railroad?

A. Because it shows the telegraph pole there. The closest stump is north of the telegraph pole.

Q. You are talking about that big tree when you are talking about the stump, are you?

A. Yes.

Q. There were smaller trees?

A. Not as I know of.

Q. Were they all sizes?

A. They were trees that were there twenty years ago and longer and they were forest growth trees.

[fol. 169] Dr. RAYMOND H. SPENCE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

Q. Give us your name, please?

A. Raymond H. Spence.

Q. And your profession?

A. Physician and surgeon.

Q. How long have you been a physician and surgeon, Doctor?

A. For almost thirty years.

Q. And where did you receive your medical education?

A. Cincinnati University—the medical college that was a part of the Cincinnati University.

Q. Since then did you go into active practice?

A. Yes sir.

Q. How long have you been engaged in the practice of your profession in Painesville, or Lake County?

A. Since the fall of 1918.

Q. Is your practice a general one?

A. It is.

Q. Did you some weeks ago, or thereabouts, examine Mrs. Meredith at our request?

A. I did.

Q. Where did that examination take place?

A. At my office.

Q. Who was present?

[fol. 170] A. Mrs. Meredith, her husband, Mrs. Oliver the nurse, Dr. Carmody, Dr. Marsh and myself.

Q. Dr. Marsh was associated with you in that examination?

A. He was.

Q. And Dr. Carmody was the family physician, as you understood it, for the Merediths?

A. Yes sir.

Q. Was Mrs. Oliver the nurse in your office or did she come with Mrs. Mederith?

A. She came with Mrs. Meredith.

Q. What sort of examination did you make, Doctor?

A. General physical examination.

Q. Did you divide that or not in any way?

A. As to the general appearance of the patient, and the examination of the injured parts.

Q. As had been indicated to you where she claimed she had been injured prior to that time?

A. Yes sir.

Q. What did you find in respect to the general examination, if we may call it, of her appearance and so on?

A. Her general appearance was one of excellent condition of nutrition; fair degree of color, indicating a very good condition of the blood stream; no indication of any general run down condition of the body or anything of that sort. The blood pressure was a normal one—average normal for one at that time of life; the heart action was good —steady—not disturbed during the examination; and there [fol. 171] was very little to see outside of the physical injury.

Q. You found, of course, that she had an amputated limb?

A. Yes sir.

Q. What did you find as to the condition of the stump?

A. Particularly good.

Q. And what indicates a good condition where there has been an amputation of that kind—what do you mean by good condition?

A. There was a heavy flap of soft tissue over the end of the bone whereby there was no apparent irritation of the parts.

Q. Was the patient wearing or had she been wearing an artificial limb?

A. She so stated that she had. She was not wearing one that day.

Q. Did you examine the other leg?

A. Yes sir.

Q. What did you find as to its condition?

A. The outer aspect of the left thigh, covering fully one-half of the outer aspect, there is a very heavy scarring of the tissues, showing that there had been an extensive sloughing of the tissues at this point with a consequent rebuilding by nature, at least a partial building in, very largely filling in this area with scar tissue.

Q. In that sort of tissue that you found there is there occasional pain?

A. Not necessarily pain—maybe and maybe not.

Q. If there is what would be the cause of it?

[fol. 172] A. Well, the cause of it might be simply due to contraction of the tissues themselves, or it may be contraction upon the sensory nerves that have been involved—filaments which are incorporated in the tissue.

Q. In the process of formation of scar tissue is it likely to contract?

A. Yes.

Q. After the tissue has been formed for some time is the contraction likely to stop?

A. In time it stops, yes.

Q. So that from that cause there would come a time when there would be no further pain?

A. Yes, sir.

Q. Is there a scar on the lower leg also?

A. Scar tissue about midway between the knee and ankle and the outer aspect of the cap of the knee. That is not a large area, but a rather marked scarring of the tissues—not deep apparently; much more of a surface affair than the other one had been.

Q. What is your opinion as to the extent of recovery of that limb from the injury received—has that leg recovered or not?

A. No, it has not recovered fully.

Q. It has made a substantial recovery, I judge from what you say—a filling in?

A. Oh, yes, indeed.

Q. Was the patient able to use it, do you think?

[fol. 173] A. She was using it.

Q. And could bear her weight on it to some extent at least?

A. She did.

Q. Did you make an examination of her nervous reflexes?

A. Yes, the patellar reflex of the left leg and the ankle-clonus.

Q. What did you find when you made the examination of the patellar reflex?

A. It reacted about average normal.

Q. How did you make that?

A. By tapping the patellar tendon at this point (indicating).

Q. The patella is the knee-cap, as laymen speak of it?

A. Yes sir.

Q. And the tendon is just below it?

A. The tendon is just below it.

Q. What does that produce when the person is normal?

A. A forward jerk of the foot—an extension of the leg.

Q. Do you determine the extent of the normality of the nervous system by the extent of the response of the foot?

A. Yes, by the response to that tap.

Q. What did you find the response to be in Mrs. Meredith?

A. I would say it was well within the average normal.

Q. Now you made some test of the reflex of the ankle, you say?

A. Yes.

Q. How did you do that?

A. By grasping the foot—the ball of the foot, and flex- [fol. 174] ing it forward up around the leg.

Q. And what did you find with reference to that reflex?

A. There was no special reaction there.

Q. What did that indicate with reference to whether or not that indicated a normal condition or not?

A. Yes, it would indicate a normal condition so far as that is concerned.

Cross-examination.

By Mr. Anderson:

Q. Doctor, you testified here last week, did you not, in the girl's case?

A. Yes sir.

Q. And when you made this examination of which you have told the jury, in your examination in chief, there was another doctor with you for the company, was there not?

A. Dr. Marsh was present.

Q. And you two gentlemen made the examination at the request of the railroad company, of the girl and of the mother?

A. At the request of the attorneys, yes sir.

Q. Which did you examine first?

A. We examined Mrs. Meredith first, as I recall it.

Q. How long ago was this examination?

A. That was made on the 30th of the month, as I understand it.

Q. Which one did you examine first, the daughter or the mother?

A. I think Mrs. Meredith was the first.

Q. You are not certain about that, are you?

[fol. 175] A. I won't say positively, but I think she was.

Q. Now, the examination was made together—I don't mean you both hit below the patella at the same time—I don't mean that, but did you make the examination, for instance, of the patellar reflex and the other doctor looked on—what about that?

A. I made an examination of the patellar reflex. I think Dr. Marsh did, although I am not positive about that.

Q. Did the other doctor hit the patella?

A. I don't know.

Q. You are not certain about that?

A. I am not certain about it.

Q. There was only one patella to strike?

A. Yes sir.

Q. As I understand, with you gentlemen, it is quite necessary to determine whether there is a difference between the right and left patellar reflexes—you could not do that because the right one was gone?

A. Yes sir.

Q. You never saw this lady professionally as a doctor before this particular time that you have told the jury about?

A. Never.

Q. And you have never seen her since?

A. I have not.

Q. In other words, that was the only time that you and your associate doctor made an examination, as you told the jury—that was the only time that you or the [fol. 176] other doctor, so far as you know, ever made any examination or paid any professional attention to either of these ladies, isn't that true?

A. It is so far as I am concerned. I know nothing of the other doctor.

Q. Had you ever given this lady any attention at all in the way of examination or anything else except this examination?

A. I say that is true so far as I am concerned. I know nothing of the other doctor.

Q. It is true as far as you know about the other doctor?

A. As far as I know, yes sir.

Q. Doctor, you examined the reflexes?

A. Yes sir.

Q. The patellar and ankle-clonus?

A. Yes.

Q. Anything else?

A. No other reflexes were examined.

Q. Well, there were quite a number of reflexes that the books of medical literature recognize to be examined, were there not?

A. Oh, there are a very great many of them to be examined—that one can examine—if they wish to take the time to do it.

Q. Did you make an examination of the Babinski or plantar?

A. No sir.

Q. The ankle-clonus and the patellar reflexes was the only examination that you made to determine her nervous [fol. 177] condition, isn't that true?

A. That plays a very small part in the observation of a nervous condition.

Q. Did you examine any other reflex except the patellar and ankle-clonus?

A. Absolutely not, so far as I am concerned.

Q. You did not time yourself, did you?

A. No sir, we were not thinking of time; we were simply doing an examination.

Q. You were making an examination at the request of the railroad company so that you might come here and tell the jury what you found—that is true, isn't it?

A. Yes sir.

Q. Now then, in preparing to come here and tell the jury what you found don't you know that your examination of the mother occupied exactly twenty-two minutes?

A. I don't know that, no sir.

Q. You would not say it was not true?

A. I would not say it was not.

Q. In other words, assuming it to be true that the only examination that you ever made of this lady—that you can make an examination of a nervous shock in twenty-two minutes, so that you can come and tell the jury about it, is that your opinion?

A. Yes sir.

Q. Doctor, I asked you a question concerning medical works before. Here is Starr—you have heard of Starr's name?

[fol. 178] A. Yes.

Q. Standard work, is it not?

A. Oh, yes, there are probably hundreds of them standard works.

Q. And Dana, standard work, is it not?

A. Yes sir.

Q. Would you kindly read who Charles Dana is, please?

Counsel for defendant objected to the question.

The Court sustained the objection.

Q. That is a standard work, is it not?

A. Yes sir.

Q. If you will glance over who Charles Dana is you will understand he is one of the great men in your profession and has been for a great many years?

A. Yes, only one of a very great many.

Q. He is a great man in your profession?

A. Yes, one.

Q. And Peterson, and Hayne?

A. All right.

Q. And Bell?

A. All right.

Q. Hamilton is a celebrated expert?

A. I don't know his work at all. I know the individual, but not the work.

Q. Here is one on pain by a Philadelphian, a standard work?

A. It is a very good work.

Q. I presume the medical literature is to you gentlemen [fol. 179] as to quite an extent our literature—the legal literature—is to us—I mean is to help us in our profession, to become learned in our profession?

A. Certainly.

Q. In other words, Starr, Dana, Bell, Peterson, Hayne and Hamilton, and so on, give their lives to an exhaustive study of a subject and then write a book for your guidance, isn't that true?

Counsel for defendant objected to the question.

The court sustained the objection.

Q. Doctor, what is an objective symptom?

A. An objective symptom is one which is self apparent to you—that you can see something—you observe certain conditions as existing.

Q. I think your definition is good, Doctor, but in other words, isn't it this, a test that you can make by an examination of the patient, where if the doctor has sufficient skill, the patient cannot fool you?

A. Yes, but it is not necessarily a test that you make at all, it is a mere matter of observation frequently, without any test being made at all.

Q. Is the patellar reflex objective, or subjective?

A. Objective.

Q. What is a subjective test?

A. It is one where you have to depend somewhat on the individual to bring it out..

Q. Is pain subjective or objective?

A. Pain is a subjective test. You cannot tell how much [fol. 180] pain a person has or whether he has a pain at all or not, except by what they say, as a rule.

Q. Do you know what the standard medical works give as an objective pain test?

A. Oh, yes, but that is——

Q. I am asking you if you know, please?

A. Yes.

Q. What is it?

A. Whereby you get some response from the general nervous system, a response in the circulatory system possibly, or a response in the respiratory system possibly, by making a pressure at some given point upon the individual.

Q. And what happens—you have just told us a little, but what happens in the test?

A. Many things can happen as far as that is concerned; there is an acceleration sometimes; oftentimes you get a reverse condition and get an impeded action of the circulation—a restriction; and may not get any.

Q. You did not make any such test at all?

A. No, because it is practically worthless.

Q. Isn't this an absolute test of pain: assume that a person says, "I have a pain here in my back", and then you press on the place where they claim to have pain and that sends the pulse up, and upon taking the pressure off the pulse goes down—is that an objective pain test?

A. It is, but it is not infallible at all. You frequently do not get it at all. You get no such reaction in a large percentage of your cases. Sometimes you do.

[fol. 181] Q. Unfortunately with professional men, including myself, there is nothing infallible?

A. Yes, it is not a positive test, that is what I am getting at. If you get it, well and good. If you don't get it, it means nothing whatsoever.

Q. Is there any possible way that I can send, by just a matter of will, my pulse up?

A. I don't know whether you can or not. Many people can.

Q. Some people can?

A. Yes.

Q. Would you try it on the judge if he would permit you? Don't you know there is not any way—absolutely none?

A. I know that is not the fact at all.

Q. Very high excitement and things of that kind will send the pulse up—but here in court, for instance, I cannot send my pulse up by willing it so?

A. I don't know whether you can or not.

Q. And reduce it by willing it?

A. I don't know.

Q. Well, try it?

A. I wouldn't know whether you are willing it or not.

Q. By pressure the pain will increase the pulse, isn't that true?

A. Not necessarily.

Q. Well, generally?

A. No, I would not say so; it might reduce it.

Q. Don't you know Benham in his work on pain gives it?

[fol. 182] A. I have read Benham. I have his work in my office.

Q. Don't you know Dana?

A. No, because certain men say things that have been a matter of some observation with them——

Q. Don't you know Starr says it? Then if it is no good would you tell us how these gentlemen, authors of your literature, put it in their books?

Counsel for defendant objected to the question.

The court sustained the objection.

Q. Well, Doctor, there are what we call reflex arcs, are there not?

A. Yes sir.

Q. And Dana, and Starr—all of them—give a table of reflex arcs?

A. Yes, there is a table of reflex arcs.

Q. What is a reflex arc?

A. It is a circuit through which this message is passed and transmitted from the sensory nerve to the motor nerve.

Q. I call your attention here to Starr's work—that has a reflex arc table, has it not?

A. I don't know.

Q. Well, look at it?

A. Yes.

Q. And Dana—that has a reflex arc table, has it not?

A. Yes sir.

Q. Right in the first part of each of these books?

A. It has.

[fol. 183] Q. Doctor, you gentlemen, I think rightly so, where some one of your profession finds something that is beneficial to the medical profession, you name that something after him, like the Babinski—isn't that true, Doctor?

A. Yes sir.

Q. The Babinski test is usually known as the Babinski test, is it not?

A. Yes, that is the only name given to it.

Q. Where is the reflex arc located in the spinal cord of the Babinski?

A. In the lumbar portion of the cord, and as to which particular vertebra—between which one or two vertebra—I am not able to say, but it is in the lumbar portion of the cord.

Q. Let me ask you as to the patellar, which is a principal reflex, where is it located?

A. There in the lumbar portion of the cord, in the third or fourth lumbar, I think.

Q. And the ankle-clonus?

A. That is higher. I cannot give you the particular vertebra.

Q. Since last week when you testified you have been looking this up?

A. I have not.

Q. Why didn't you tell me last week? You said you didn't know when I asked you.

A. That is not a fact.

Q. Where is the pupillary reflex arc?

[fol. 184] A. I don't know. Those things I don't pretend to keep in my mind at all.

Q. Pardon me, you are coming here to testify as a railroad company expert, are you not?

A. I am testifying as to conditions, but not as to locations in the segments of the cord.

Q. You don't claim to have sufficient knowledge to testify as to that?

A. I don't attempt to memorize those at all—that is too big to memorize.

Q. Doctor, how much of the right leg has this lady got left?

A. She has about one-third—the upper third.

Q. About how many inches has she left?

A. I would say from six to seven inches.

Q. Of course, that is a permanent injury—you will agree to that?

A. Certainly.

Q. Now, the other leg—the jury has seen the scar tissue and so on—I will say that in advance. How much scar tissue is there there?

A. An extensive surface. It covers from end to end and side to side I would say two-thirds of the outer aspect of the thigh.

Q. That is scar tissue, is it not?

A. It is.

Q. And its nature is to contract, is it not, up to a certain time?

[fol. 185] A. Up to a certain time.

Q. And there is some nerve left in the scar tissue?

A. There is.

Q. But not as much as there would be in the tissue before it was scarred?

A. Ordinarily not, no sir.

Q. And there is some little circulation in the scar tissue?

A. There must be to have it living.

Q. But not nearly as much as there was before the injury?

A. Not so much.

Q. Doctor, is a malignant growth, such as cancer—is it a germ disease, or what is it? You don't know, do you?

A. We don't know.

Q. Science has not yet arrived at the place of knowing the origin of cancer?

A. We do not know the true origin of it.

Q. It has been working on it but as yet don't know?

A. No sir.

Q. Take smoking, for instance—the excessive smoking of a pipe—excessive pressure on the lip, that will cause cancer, isn't that true?

A. We used to think so. That was mostly a theory. They have never proven it at all.

Q. With the scar tissue—is there any certainty that that large scar tissue there on the leg will not break down in the future—would you venture an opinion as a professional man that that scar tissue will not break down some time, at least to some extent?

[fol. 186] A. I would say any such likelihood is the most remote thing imaginable.

Q. Is it your opinion that scar tissue will not break down again?

A. That is my opinion, yes sir.

Q. Is there any certainty that that scar tissue, by reason of lack of circulation, and by reason of lack of nerve life, will not develop into a cancer?

A. That is more remote than the other.

Q. What is that?

A. I say that possibly is more remote than the other, because we very seldom get a malignant condition developing out of such a condition. It is usually an organ fully supplied with blood which breaks down.

Q. This lady is confronted with at least the fear of a malignant cancerous growth there in the future?

A. I have no idea what she is confronted with or anything of that sort.

Q. You have spoken of certain reflexes, Doctor. Let me ask you, do you know where the Gordon reflex is located?

A. I do not. I think it is about the foot, but I am not positive at all about it. It is one of the obscure ones. There are thousands of them.

Q. You couldn't tell me about the Gordon last week, could you?

A. No, I don't know it now.

Q. Do you know the coronal reflex?

A. I do not. Those are all remote and obscure affairs.

[fol. 187] Q. Doctor, I have here twenty different reflexes?

A. Yes, and there are lots more than that?

Q. Women are so constituted that their nervous system is so constituted that a nervous shock has more lasting effects as a rule upon a woman than upon a man?

A. I would not say that is the case.

Q. In other words, you think a woman is as strong to resist the effects of a nervous shock as a man?

A. Sometimes more so.

Q. Not sometimes—generally?

A. I would say on the average just as well.

Q. Getting in an automobile and being carried, as I assume she was carried, 657 feet down the track and then being pulled under the tender and then receiving these awful injuries that resulted in the condition that you find at present, and then being in the hospital for a long time, would that have any effect in producing nervous shock, Doctor?

A. Certainly it could.

Q. Can you think of a worse condition?

A. I am not thinking about worse conditions.

Q. Can you tell of a worse condition in the way of producing nervous shock?

Counsel for defendant objected to the question.

The court sustained the objection.

Q. Do you know Dr. Crile of Cleveland?

A. I know Dr. Crile.

Q. Have you read his book on shock?

A. I would not say I have read it from cover to cover, [fol. 188] but then I have read interesting parts.

Q. Do you remember that he says in that book that the molecules of the nerve are the same as the molecules of any metal and the results of nervous shock are permanent?

A. Yes, but that is purely theory; there is nothing to back up such a statement at all. There is no way of knowing. It is one of Dr. Crile's theories that he likes to write about.

Q. Do you think you are in as good a position to tell about this lady's injury and about the future and so on as if you had been her physician and had her under your observation for the last two years?

A. I have no knowledge of Mrs. Meredith's former condition. All I can say is what I observed at the time I made my examination.

Q. In other words, Doctor, in the twenty-two minutes that you and another doctor made all this examination—assuming that to be the time—that you are in as good a position as a man who had seen her many times and had her under his observation for a good many years—what about that, Doctor?

A. Well, I have never compared my opportunities with somebody else's. All I did was examine the lady and give my opinion as I saw it without thought of anybody else connected with the case.

Q. Is it your opinion the *the* more frequently you see an injured or diseased person that you are not in any [fol. 189] better position to tell about it?

Counsel for defendant objected to the question.
The court sustained the objection.

[fol. 190] Dr. V. N. Marsh, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

Q. What is your name, please?

A. V. N. Marsh.

Q. What is your profession?

A. Physician.

Q. How long have you been a physician and surgeon, Doctor?

A. Since 1900.

Q. Where did you receive your medical education?

A. The Cleveland College of Physicians and Surgeons, and the New York University, and the Bellevue Hospital Medical College.

Q. Did you begin the general practice of medicine immediately after your graduation?

A. Yes sir.

Q. How long have you practiced in Painesville and Lake County?

A. Fifteen years.

Q. Your practice is a general one, is it?

A. General practice.

Q. Did you make an examination, in connection with Dr. Spence, of Mrs. Meredith some two weeks ago or thereabouts?

A. Yes sir.

Q. Where was that examination made?

A. In Dr. Spence's office?

[fol. 191] Q. Who were present?

A. Dr. Spence and Dr. Carmody, Mrs. Meredith, and Mr. Meredith, and a nurse.

Q. Tell us first, Doctor, what you found as to the general appearance, of the general condition of Mrs. Meredith from that examination?

A. She seemed well nourished and of a good color, and her organs generally—that is, the heart, the lungs, were apparently normal.

Q. Your attention was directed to the fact that she had lost a limb?

A. She had lost the right limb by amputation at the upper third of the thigh.

Q. Tell the jury what you found the condition of that limb that was amputated to be?

A. The amputation stump was in excellent condition—especially good from a surgical standpoint.

Q. What makes an amputation of that kind in a good condition as you understand it?

A. Plenty of padding over the end of the bone.

Q. Was she wearing or using an artificial limb, do you know?

A. I understood she had been. She did not have it on at the time I saw her.

Q. You made some observation of the other limb?

A. There was a large scar on the outer thigh—the outer part of the thigh of the left limb, which showed there had been a considerable destruction of tissue and scarring, [fol. 192] and puckering, which was all healed up at the present time, and the scar left; and on the lower leg about halfway between the knee and the ankle there was another scar, not so large nor deep, which was considerably puckered and the scar tissue.

Q. Scar tissue, Doctor, is supplied with blood and nerves, is it?

A. Not very much supplied with it, no sir.

Q. Less than normal?

A. Less than normal.

Q. Is there anything about scar tissue in and of itself that causes pain?

A. Not unless it causes pressure on a nerve.

Q. Does it ordinarily do *not*?

A. No; not ordinarily; it depends on the position of it.

Q. Did you see anything about this patient when you examined her that indicated that that scar tissue was causing pain or not?

A. It did not seem to be tender upon her examination.

Q. From your examination of that leg would you say she was able to use it?

A. Yes, she was able to use it.

Q. Did you examine her reflexes to determine something about her general nervous condition?

A. Yes, the reflexes were normal.

Q. There are a great many reflexes, Doctor?

A. There are a great many reflexes.

Q. Which ones did you examine?

[fol. 193] A. I examined the patellar reflex, the eye reflex and the ankle-clonus reflex.

Q. How do you examine those reflexes, Doctor?

A. The patellar reflex you strike the leg—strike over the patellar tendon and there is a response by jerking the leg up.

Q. What does that response indicate to you?

A. The complete absence of it would indicate certain nervous disease.

Q. And is there an accelerated response also?

A. Yes sir, an accelerated response.

Q. And that indicates there is a normal condition of the nervous system?

A. Yes sir.

Q. What did you discover the patellar reflex of Mrs. Meredith to be.

A. It was normal.

Q. The other reflexes, were they normal or otherwise?

A. Yes sir, they were normal.

Q. You say that you took the heart and examined the lungs?

A. Examined the lungs. They did not show anything wrong.

Cross-examination.

By Mr. Marshman:

Q. Doctor, the lower left leg, there was, you said, a smaller scar tissue on it?

A. Yes sir.

Q. That indicates that the wound was not as deep as the [fol. 194] upper part of it?

A. No sir.

Q. And the upper part of the leg there was quite a large scar tissue there, was there?

A. Yes sir.

Q. And involving the whole side of the leg almost from the hip to the knee?

A. There was a considerable destruction.

Q. That never repairs itself?

A. The tissue that is gone does not repair itself; it is replaced by scar tissue.

Q. And during the progress of its healing, state whether or not that would be a painful injury?

A. There would be a certain amount of pain, of course, in any injury of that kind.

Q. And the stump, I think you said that Dr. Carmody had done an excellent job in getting a stump?

A. Yes sir.

Q. Even though he had done an excellent job the wearing of an artificial limb upon that stump would be painful at first?

A. Not necessarily painful; it would be some at first.

Q. I am told that she wears a series of stockings on there, is that a general practice?

A. Yes, it is usual to wear stockings.

Q. What is the purpose of that, Doctor?

A. To overcome the friction between the leg and the stump.

[fol. 195] Q. Because of the extreme tenderness of the stump, isn't that it?

A. I would hardly say there is extreme tenderness of that stump.

Q. Now, Doctor, as to nervous trouble—are women as liable to nervous trouble as men or are they just the same?

A. I should say women as a whole are probably more inclined to nervous trouble.

Q. As a whole they are more inclined to nervous troubles, aren't they?

A. Yes.

Q. You understood, Doctor, how Mrs. Meredith was injured?

A. In a general way.

Q. She was struck at a crossing and pushed along for six hundred feet, screaming all of that time, and at ~~last~~ her leg was carried under and injured as you saw it to be. Would you expect a person under those circumstances to suffer a nervous shock?

A. Yes. I would.

Q. Could not escape it, could they?

A. No.

Q. And the duration and extent of that nervous injury due to that nervous shock depends somewhat at least upon the fear, wouldn't it?

A. Fear would have a bearing on it, yes.

Q. If a person knew themselves to be permanently injured—that added to the nervous shock, would cause a sort of vicious circle, wouldn't it—that would have a depressing effect? [fol. 196]

A. Yes sir.

Q. And the extent and duration of that nervous trouble is extremely difficult for any medical man to tell about, isn't it?

A. Yes, it is difficult to tell.

Q. When you saw Mrs. Meredith for example, you looked at her and observed her appearance?

A. Yes.

Q. And do you state, Doctor, that Mrs. Meredith has never suffered any nervous trouble since this accident?

A. No, I could not say she had. I meant to say that there was not any evidence of any serious disturbance of the nervous system so far as I could find out from my examination.

Q. When one is examined for nervous trouble, many times that patient is taken to the hospital or some place and put under observation for many days to get their reaction to different things, isn't that true?

A. Yes sir.

Q. As I understand, you and Dr. Spence in this examination were only attempting to get a general knowledge of her apparent condition?

A. Yes sir.

Q. Not as an expert in neurotic trouble?

A. No sir.

Q. About how long were you engaged in this examination, Doctor?

[fol. 197] A. I suppose three-quarters of an hour. I didn't time it.

Q. That was of both Mrs. Meredith and Lee Anna, wasn't it?

A. No, I should say altogether we were up there nearer two hours.

Q. Much of the time was taken up in preparing the patients for examination and getting them dressed, and so forth?

A. Certainly.

Q. And I suppose some time was taken up in inquiring of their condition and talking with them without making the examination itself?

A. Yes sir.

Q. And in the test for neurotic trouble you made three tests, Doctor Marsh, am I correct?

A. Yes.

Q. And that was your full test for neurotic trouble?

A. Well, except a general observation of the patient's manner.

Q. How long did these three tests take?

A. Those three tests themselves would not take more than two or three minutes.

Q. Only a short time?

A. Yes sir.

Q. And these tests, if I understand you correctly—there are many and many reflexes besides the tapping the tendon reflex?

A. Yes.

Q. And all of those reflexes give you some idea of the nervous trouble—that is the purpose of all of them?
[fol. 198] A. Yes; it is a different matter if you are looking for a specific disease of the nervous system, but to get a general idea of the general condition of the nervous system one test is about as good as another.

Q. The pateller reflex—you said that was about normal?

A. Yes. It is not the same in every individual. There is a certain response—it may be considerably exaggerated or considerably lessened. It is not always the same.

Q. In other words, you might get a certain response or reaction from me in distance and quickness and another and different one from one of the other attorneys and both of them be normal?

A. Yes sir.

Q. When does the time come when it is not normal?

A. That is a matter of judgment. When you make hundreds of examinations you get to know what is normal and what is not.

Q. Each doctor determines that for himself?

A. Yes.

Q. For example, let us assume that that knee jerk was exaggerated, what story would that tell you?

A. It would tell me there was an excitable condition of the nervous system.

Q. And if it was subnormal or did not react what would that tell you?

A. If it was completely absent it would indicate that there might be some diseased condition of the spinal cord that [fol. 199] interfered with the reaction.

Q. Is there any difference between abnormal and subnormal?

A. Yes; abnormality would be either more or less. Subnormality would be less.

Q. Doctor, you have said that if there was an exaggerated reflex, for example, you would say that that showed an excitability?

A. Yes, that is the reason I made the test to find out if there was a disease.

Q. Did that indicate a disease?

A. Not what I speak of as organic disease.

Q. Not as serious as complete absence?

A. No sir.

Q. When you and Dr. Spence made this examination did you do it together or was it separate?

A. We made the examinations separately. We were right together in the room at the time.

Q. Each made your separate tests. What I mean to say is the time they were up there was when both of you were looking at both of the ladies and you each made separate tests?

A. Yes sir.

Q. Was Dr. Carmody present at those tests?

A. Yes.

Q. And an important thing in the discovery of difficulty with the nervous system is observation, isn't it?

A. Yes, that is important.

Q. And the longer and more minutely one examines a patient the better position the doctor would be in to give a [fol. 200] good opinion, isn't that so?

A. I think so.

Redirect examination:

Q. Doctor, shock ordinarily follows any injury of any magnitude, doesn't it?

A. Yes sir.

Q. And the extent of the shock is somewhat in proportion to the extent of the injury?

A. Yes sir.

Q. And in your practice and among the medical profession generally you expect a patient to recover from that shock in the lapse of time?

A. Yes, with the lapse of time.

Q. In your opinion from your examination of Mrs. Meredith, was there any evidence left of the result of nervous shock?

A. There was none that I could see.

Q. You discovered none?

A. No sir.

Recross-examination:

Q. The fact that you did not discover it, Doctor, does not enable you to say to this jury that this woman might not have had nervous shock at some other time?

A. No sir.

Q. In other words, you did not have a full opportunity to examine in order to have an opinion, did you?

A. Except where there is a real disturbance of the nervous system, it is apparent most of the time if there is very much disturbance of the nervous system.

[fol. 201] Q. The disturbance that you are talking about now is a diseased disturbance, isn't it?

A. No, I mean any disturbance. If there is a neurotic condition of any kind it is more or less apparent. It is not the same all the time.

[fol. 202] Mrs. Helen H. Merrill, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. What is your name?

A. Helen Hopkins Merrill.

Q. What is your husband's name?

A. John S. Merrill.

Q. Where do you live, Mrs. Merrill?

A. At the corner of Huntington Road and Hardy Road.

Q. The Huntington Road is the road that goes down past the Mantel fruit farm and turns around to the west toward Fairport, is it?

A. Yes sir.

Q. And at the point where that curve is the Hardy Road starts off and goes down to the lake?

A. Yes sir.

Q. And you live on the Nursery Road, I believe it is?

A. Yes sir.

Q. And just before you get to the corner of the Hardy Road?

A. Yes sir.

Q. How long have you lived in that vicinity, Mrs. Merrill?

A. Twenty-two years November 1st.

Q. Before that did you live on the Hardy Road for a short time?

[fol. 203] A. Yes, nearly a year.

Q. You lived in that section of the township and went to school out there before you were married?

A. I have lived there practically all my life.

Q. You were a school teacher before you were married?

A. Yes sir.

Q. Do you remember the time, said to be July 19th, 1929, when Mrs. Meredith was injured at the crossing?

A. Yes, sir.

Q. Where were you that day?

A. I was at home.

Q. Did you learn some way that there had been an accident at the crossing?

A. When one of the men came up there to telephone.

Q. A member of the crew do you mean?

A. Yes sir.

Q. He telephoned for the doctors or ambulances or something of that kind?

A. Yes sir.

Q. And in that way you learned there had been an accident?

A. Yes sir.

Q. Can you tell the jury about what time that was?

A. As I remember, about 4:30 in the afternoon.

Q. Can you tell about where you were in the house?

A. In the rear of the house, in the kitchen.

Q. Can you recall what you were doing?

A. I was ironing.

[fol. 204] Q. Which way did that kitchen face, Mrs. Merrill?

A. The outside door faces north.

Q. Towards the lake?

A. Yes sir.

Q. And the windows also, I suppose, of the kitchen?

A. There is a window in the south and also in the north.

Q. Sometime shortly prior to the occasion when this man came and telephoned for doctors and ambulances, did you see a train on the F. P. & E. railroad?

A. Yes sir.

Q. Are you familiar in a general way with the course of the F. P. & E. Railroad track as it goes down towards the New York Central and then turns and goes across Hardy Road?

A. Yes sir.

Q. You know about where it is?

A. Yes sir.

Q. And that was so back in 1929?

A. Yes sir.

Q. Tell the jury if you saw a train shortly before this telephone message—where it was when you saw it.

A. I heard a whistle and glanced up and saw it passing.

Q. Do you know where the curve is where it turns from going north in a westerly direction, about?

A. Yes sir.

Q. Tell the jury where the train was in reference to that curve when you looked up?

A. As I remember it — just around the curve when it whistled.

[fol. 205] Q. You mean the front end of it had just rounded the curve?

A. Yes sir.

Q. What caused you to look up?

A. It gave a whistle.

Q. You heard a whistle?

A. Heard the whistle, yes sir.

Q. Do you know whether there was more than one blast?

A. I do not know.

Q. You were not concerned particularly at that time?

A. No sir.

Q. You glanced up in the direction from which the whistle came?

A. Yes, looked right out from where I was standing.

Q. You did not look through the door?

A. No; through an open door.

Q. I don't know whether you heard a bell or not?

A. No sir, I do not recall a bell.

Q. About how far would the place where you were in your kitchen be from that curve?

A. I would think about a quarter of a mile.

Q. There is nothing so but what you can see across the fields?

A. From that kitchen door, no sir.

Cross-examination.

By Mr. Marshman:

Q. How long after you saw that engine and train before the man came up to the house to use the phone?

[fol. 206] A. I could not say exactly, but a comparatively short time.

Q. Half an hour?

A. Not that long.

Q. Less than half an hour?

A. Yes sir.

Q. What did he do at your house—use the telephone?

A. Yes sir.

Q. Did you talk with him about the accident?

A. No sir, other than just getting Central. I was helping him, I got the book for him.

Q. How did you learn of the accident then if you did not talk with him?

A. He said there was an accident.

Q. Then you had some talk about it when he came there?

A. He asked for the telephone book.

Q. And did he say why he wanted to use the phone?

A. Yes sir.

Q. From where you first saw the train, which part was on the curve, the engine itself—was it up to the curve at that time or had it gone around the curve?

A. The engine was just rounding the curve.

Q. When you first saw it?

A. Yes sir.

Q. If I understand you correctly, Mrs. Merrill, you first saw it when you heard the whistle?

A. When I heard the whistle.

[fol. 207] Q. How many blasts of the whistle did you hear from that time to the time the engine got to the crossing?

A. I do not recall only one.

Q. One blast?

A. Yes sir.

Q. You stayed right in your kitchen for quite a time after that first blast?

A. Yes sir.

Q. And of course, you had view, of course at a distance, all the way down to the crossing?

A. Yes sir.

Q. You could see it all the time?

A. Yes sir.

Q. Did you tell the man that came up there that you had heard the whistle?

A. No sir.

Q. When did you first tell anybody about it?

A. I do not recall when I did.

Q. About when?

A. I could not tell you.

Q. Did you ever tell these attorneys about it?

A. Well, I did tell since I came up here; but I have never had any talk with them before at all.

Q. You never had any talk with Mr. Dickson before about it?

A. Not until the morning I came up here.

Q. He had never seen you?

A. I had never seen any one.

[fol. 208] Q. You don't know how they found out about your hearing?

A. No sir, I do not.

Q. Did you have any talk with any railroad man at all about this?

A. No sir.

Q. Did you ever give a statement about this?

A. No sir.

Q. How long after the accident occurred was it before you ever told anybody that you had heard the whistle?

A. I don't remember.

Q. About how long?

A. I could not tell you.

Q. Did you discuss that with a lot of people?

A. I don't recall that I did.

Q. You know Mr. Meredith, don't you?

A. Yes, slightly.

Q. And Mrs. Meredith?

A. Yes sir.

Q. They are neighbors of yours down there?

A. Yes sir.

Q. Live in the same vicinity?

A. Yes sir.

Q. Did you ever have any business transaction with Mr. Meredith?

A. Well no, we have not.

Q. Did you ever own a gasoline station, Mrs. Merrill?

A. Yes sir.

Q. You are now married?

[fol. 209] A. Yes sir.

Q. Have you any children?

A. Yes sir.

Q. Who was at home at the time of the accident, besides you?

A. No one.

Q. And you cannot help us by telling us the first time that you ever told anybody about hearing the whistle?

Counsel for defendant objected to the question. The Court sustained the objection.

Q. Mrs. Merrill, do you want this jury to understand that you have never told any railroad person about this, about what you are testifying about today?

A. I do not recall any time that I have told any railroad man.

Redirect examination:

Q. The only man you have talked with I understand, was Mr. Dixon?

A. Yes; the morning that I came up last week, I talked with Mr. Dixon.

Q. You testified last week in the case of the Meredith girl, as a witness?

A. Yes sir.

Q. And it was the morning of that day that you talked with Mr. Dixon?

A. Yes sir.

Q. Where did you talk with him?

[fol. 210] A. At our house.

Q. And that was the first time you ever talked with anybody connected with the railroad?

A. Yes sir.

Recross-examination:

Q. Were you subpœnæd to come here?

A. Not the first time, no sir.

[fol. 211] William R. Carroll, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

Q. What is your full name, Mr. Carroll?

A. William R. Carroll.

Q. Where do you live?

A. I live in Chardon.

Q. And by whom are you employed?

A. The Illuminating Company.

Q. How long have you been in the service of the Illuminating Company?

A. About six years.

Q. In what capacity?

A. Mostly as trouble man.

Q. By that you mean a man who goes around and locates trouble in the electric line?

A. Yes sir.

Q. In the summer of 1929 where did you live?

A. I was living at Sunset Point, Painesville.

Q. Sunset Point is where?

A. East of Painesville Township Park.

Q. To reach Sunset Point from Painesville you go down Hardy Road and turn east on the lake road and go about a mile or so to get to Sunset Point?

A. I imagine about a mile.

Q. Do you recall learning in the summer of 1929 about [fol. 212] an accident in which Mrs. Meredith and her daughter were involved?

A. Yes sir.

Q. Was it about the 19th of July two years ago?

A. Yes sir.

Q. Do you recall where you were that afternoon?

A. I was at a cottage I had rented at Sunset Point. I left there about three-forty or forty-five.

Q. Who was with you?

A. A friend of mine, Steve Green.

Q. He was employed with the Electric Illuminating Company also?

A. Yes sir.

Q. And he was with you at the cottage?

A. Yes sir.

Q. You left the cottage about 3:45?

A. Yes sir. I had to report for work at Painesville and I left the cottage to report for work.

Q. How did you leave the cottage?

A. I left in a Chrysler sedan automobile.

Q. Who owned the car?

A. It was mine.

Q. Describe how you came to Painesville—over what road did you pass to come to Painesville?

A. I came up to—I guess it is called Lake Road—from Sunset Point to Township Park and up the Hardy Road to the North Ridge, and from the North Ridge into Painesville.

Q. You drove up the Hardy Road about how fast?

A. I imagine thirty to thirty-five miles an hour on the Hardy Road.

[fol. 213] Q. To bring you to Painesville about four o'clock when you were going to work?

A. Yes sir.

Q. You knew, of course, that there was a railroad crossing on Hardy Road?

A. Yes sir.

Q. And you went over it on this day when you went up?

A. Yes sir.

Q. As you went up Hardy Road what did you hear?

A. After I crossed the railroad tracks I heard a whistle.

Q. About how far had you got across the tracks when you heard the whistle?

A. Two hundred and fifty or three hundred yards.

Q. Did you hear more than one blast?

A. I could not say.

Q. Did you look when you heard the whistle?

A. Yes sir.

Q. To what direction did you look?

A. I looked to the east.

Q. What did you see?

A. I saw a freight train, or an engine and some cars.

Q. Where was the engine?

A. Just making the bend east of the crossing when I noticed it.

Q. The front part of the engine was on the curve, do you mean?

A. Just rounding the curve.

Q. And from where you were could you tell upon what [fol. 214] part of the curve the engine was?

A. No, not exactly.

Q. Can you give the jury any judgment about that, whether it was one end of it or the other, or the middle?

A. It looked to me as if it was just about the middle of the curve.

Q. Can you give the jury any judgment as to how far, when you were this distance, two hundred and fifty or three hundred feet south of the railroad track—how far the engine was from you?

A. I judge about fifteen hundred feet.

Q. From Hardy Road, do you mean?

A. From Hardy Road, yes sir.

Q. And as you came up the Hardy Road after you left the lake road and before you got to the railroad crossing did you see a Packard car anywhere?

A. I saw a car standing in the yard at Mr. Meredith's cottage.

Q. You know where Mr. Meredith lives?

A. I know where his cottage is located.

Q. Which way was the car headed?

A. Towards the driveway.

Q. Was there anybody in it?

A. Yes sir, there was some one in it.

Q. Can you tell whether it was a man or a woman or who it was?

A. I could not say.

Q. You came on then after you had seen the train and heard the whistle, as you have described—did you come on to Painesville?

[fol. 215] A. Yes sir.

Q. Did you afterwards learn that there had been an accident at the crossing?

A. I did after I arrived at Painesville.

Q. Where did you go in Painesville?

A. Reported to the garage on South State Street.

Q. About what time did you report there?

A. Around four o'clock.

Q. Was it then that you learned there had been an accident?

A. I did not learn until some time afterwards—some time after I reported there—I think about three-quarters of an hour.

Cross-examination.

By Mr. Marshman:

Q. Mr. Carroll, you were going in a southerly direction, I take it?

A. Yes sir.

Q. The road beyond the crossing is straight, at least so far as from that to the point where you heard this whistle?

A. Yes sir.

Q. You testified here last week, didn't you?

A. Yes.

Q. I think you told me at that time that you thought there was one blast of the whistle?

A. I am sure of one, I would not say whether there was any more or not.

Q. The one you heard was when the engine was back up in the curve from the crossing?

[fol. 216] A. Yes, that is right.

Q. And when you heard that that made you more alert as to any more that might have been blown, didn't it, or did it make you less alert?

A. You know how much attention you pay to a whistle when you are driving along a road.

Q. Did you have some conversation about this whistle with Mr. Green?

A. Yes, I did.

Q. Discussed it between you. He said he heard that blast of the whistle and you said that you heard it. Where was this discussion—as you rode along up there?

A. It was after we got to Painesville—after we heard of the accident.

Q. Didn't you have any discussion as you were riding along there after you heard the whistle?

A. No, we did not.

Q. Not a word was said then. Neither Green nor you mentioned the whistle at all?

A. No, never thought of it.

Q. After you turned and looked you would be going southerly—you would look to your left to where the train was?

A. Yes sir.

Q. Wasn't there a hedge along the left side—wouldn't you have to look out of the back window?

A. No sir.

Q. There was not any hedge along there?

A. I don't know whether there was any hedge there or [fol. 217] not; but you didn't have to look out of the back window to see the train.

Q. At that time did you notice the position of the engine on the track?

A. What way do you mean?

Q. Was it pulling the cars?

A. The engine was pulling the cars—the cars were back of the engine.

Q. How long did you observe the engine and train after you saw it?

A. Well, not very long.

Q. When was the first time that you told Mr. Dixon anything about the accident?

A. I told Mr. Dixon when he came to see me.

Q. Did you write out a statement for him?

A. Yes sir.

Q. Did you write it out in your handwriting?

A. No, I did not.

Q. Did he bring a typed statement to you?

A. A typed statement, yes sir. I was there when it was dictated, though.

Q. You saw it made up?

A. Yes sir.

Q. That was when, Mr. Carroll?

A. I believe it was the next day after the accident.

Q. Have you seen that statement since?

A. Well, I have a copy of the same one.

[fol. 218] Q. Have you seen your copy?

A. Yes sir.

Q. When did you see it last?

A. The day before I was up here last week.

Q. Have you got it now?

A. I have got it, but there is only a part of it.

Q. At the time you left your cottage you had to pass the Meredith cottage to go to the Hardy Avenue crossing?

A. Yes.

Q. And if I understand you correctly you saw the Meredith car up in their driveway?

A. I saw a car, but I didn't know whether it was Mr. Meredith's car or not; I didn't know what kind of a car he had, but it was in his driveway.

Q. What kind of a driveway was that—one that had bricks painted white on either side?

A. I can't tell you, because Mr. Meredith has done repair work on his cottage—the driveway.

Q. At that time there was some people or women in the car?

A. There was some people. I could not say whether they were women or men.

Q. Was this car headed out toward the street or backward?

A. Headed in like, as you drive in the driveway from the street.

Q. How far was it in there?

A. Possibly fifteen or twenty feet.

Q. You came around the corner there and, I take it, [fol. 219] merely glanced and took it that they were coming out and going up the road, too?

A. Yes, that is right.

Q. Do you want to tell the jury that there was any other blast there, short or long, soon after you heard the first blast?

A. No sir, I would not want to say.

[fol. 220] **Merle Pitman**, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

Q. What is your name?

A. Merle Pitman.

Q. Where is your home, Mr. Pitman?

A. Out here at the Mantle & Mantle farm.

Q. You are employed there, do you mean?

A. Yes sir.

Q. Are you a married man?

A. No sir.

Q. How long have you been employed by Mr. Mantle?

A. Off and on for the last five years, not steady.

Q. What kind of work do you do?

A. General farm work of all kinds—fruit farming.

Q. The Mantle & Mantle farm is down the Hardy Road from here?

A. Yes sir.

Q. And called the "Lake Erie Fruit Farm", or something like that?

A. Yes sir.

Q. You have been there off and on for five years?

A. Yes sir.

Q. Were you working for the Mantles in the summer of 1929?

A. Yes sir.

Q. Do you remember the occasion in that summer that Mrs. Meredith was injured in an accident at the Hardy Road crossing?

[fol. 221] A. Yes sir.

Q. Do you remember where you were on that afternoon?

A. I was driving down that road toward the railroad track with a team.

Q. Driving where?

A. On the Painesville Park Road.

Q. From Mantle's farm where the buildings are?

A. Yes.

Q. Down towards what?

A. Towards the Hardy Road.

Q. Driving on the pavement?

A. Yes.

Q. What time of day were you making that trip?

A. Between three and four o'clock.

Q. Do you know in a general way where the tracks of the F. P. & E. railroad run down toward the lake and cross Hardy Road?

A. Yes sir.

Q. You had that knowledge in 1929?

A. Yes sir.

Q. While you were on your way down from the Mantle farm did you hear a whistle?

A. Yes sir.

Q. Coming from what direction?

A. Coming from the north-east.

Q. What was that direction from where you were?

A. On the right-hand side of me.

Q. That was where the railroad track was?

A. Yes.

[fol. 222] Q. Tell the jury where you were that time on the road when you heard this whistle?

A. I was at this first house south of Merrill's.

Q. What did you hear when you were there?

A. I heard two long whistles and after that I heard a bell ring.

Q. You heard two long whistles—how far apart were they?

A. Not very far apart.

Q. Looking in the direction from where you were to the railroad track could you see anything?

A. No sir.

Q. After you heard two long blasts of the whistle what did you do?

A. I kept driving toward the railroad track thinking the train would be gone when I got there.

Q. Driving down the Hardy Road?

A. Yes sir.

Q. Where were you going?

A. To that orchard there the other side of the railroad crossing.

Q. You could see the railroad crossing, I suppose?

A. Yes sir.

Q. State whether or not there were any cars on the crossing at that time—railroad cars?

A. A train was crossing the track and then stopped.

Q. Had it stopped then?

A. Yes sir, stopped.

[fol. 223] Q. You drove on down to it and stopped?

A. I drove on down to it and stopped.

Q. Did you leave the team there?

A. I left the team on the side of the road.

Q. And you went to the scene of the accident?

A. Yes sir, I went to the scene of the accident.

Q. When did you come back?

A. I stayed until it was all over with and they moved the train away, and I could go on across.

Q. Can you tell how far from the Hardy Road crossing the train was when you heard the whistle, if you have any judgment about it?

A. It was about twelve or fourteen or fifteen hundred feet up to the turn.

Q. Did you know where the turn was at that time?

A. Yes sir.

Q. You think it was fourteen or fifteen hundred feet from the highway crossing?

A. Yes sir.

Cross-examination.

By Mr. Marshman:

Q. Would you say that this train was up on the curve when you heard the whistle?

A. Yes sir, it sounded in that direction.

Q. You could not see it?

A. I could not see it.

Q. Couldn't it have been three or four hundred feet [fol. 224] from that curve?

A. It could.

Q. Have you talked with anybody about this case since the last time?

A. No sir.

Q. Have you told Mr. Dixon anything?

A. Yes sir.

Q. Why did you tell me "no" a minute ago—am I confusing you, sir?

A. Not as I know of.

Q. When did you talk to Mr. Dixon after this last trial?

A. After this last trial?

Q. Yes.

A. I have not talked with him at all—just spoken to him.

Q. When did you speak to him?

A. I spoke to him down to the railroad crossing yesterday and in here yesterday forenoon, or afternoon it was.

Q. How long have you been out in the witness room waiting to testify?

A. I came at two o'clock.

Q. You didn't talk to Mr. Dixon at all?

A. No sir.

Q. On direct examination here, Mr. Pitman, you said you heard a bell rung there, did you?

A. I heard it ring after the whistle.

Q. Did you tell us that when you testified here in Lee Anna Meredith's case last week?

A. Yes sir.

[fol. 225] Q. How far away from that crossing itself were you when you heard the whistle and that bell—what was the distance?

A. Fifteen hundred or two thousand feet up to the railroad crossing, I would think.

Q. It is over a quarter of a mile from Mrs. Merrill's down to that crossing, is it not?

A. Something like that.

Q. Is it not a fact that the time that you say you heard this whistle you were down in quite a deep hollow?

A. Not so deep; it is quite a small hollow, not as deep as the other hollow is.

Q. Now this whistle that you heard, describe it as to the type of blasts, whether they were long or short, or just what?

A. Two long blasts.

Q. And you think that the engine at that time was at least fifteen hundred feet from the crossing up at the curve?

A. It sounded from the curve and that is fourteen or fifteen hundred feet.

Q. And after that you were approaching the crossing, weren't you?

A. Yes sir.

Q. Did you hear that railroad engine whistle and ring the bell after that—after you heard those two blasts?

A. I heard the ringing of the bell—not the whistles.

Q. You heard the ringing of the bell all the way up there?

A. Yes sir.

Q. You didn't hear any more whistles?

A. I did not hear any more whistles.

[fol. 226] Q. You were with a wagon?

A. Yes sir.

Q. You say you were about six hundred feet from the track when you first saw the crossing?

A. Yes sir.

Q. Was the engine on the crossing then or not?

A. It was below the crossing.

Q. And stopped?

A. Stopped.

Q. What was the first time that you told anybody about this accident and about hearing the whistle?

A. Well, it was right the same day it happened I told my friends.

Q. When was the first time you told Mr. Dixon?

A. In the middle of July.

Q. Of this year?

A. Yes.

Q. You never had a word with him or with any other railroad man until this year in July?

A. Until this year in July.

Q. That apple orchard, that is along the east side as you approach the crossing from the north, is quite thick, isn't it, and was at that time?

A. It was not at that time; them trees is two years older now.

Q. When you came up the road at that time you could see through that apple orchard and see an engine on the rails with comparative ease, could you?

A. Yes.

[fol. 227] Q. No difficulty at all?

A. No sir.

Q. Anybody that was looking?

A. Yes sir.

Q. And they could see an engine on the rails all the way down there, could they?

A. Yes sir.

Q. Nothing to prevent them at all?

A. No sir.

[fol. 228] Stephen Green, a witness called on behalf of the defendant, being first duly sworn testified as follows:

Direct examination.

By Mr. Nolan:

Q. What is your full name?

A. Stephen Green.

Q. You live where, Mr. Green?

A. Ashtabula.

Q. About how long have you lived in Ashtabula?

A. About a year.

Q. Prior to that where did you live?

A. Painesville.

Q. What is your business?

A. Store-room clerk for the Cleveland Electric Illuminating Company.

Q. Where are your duties performed—where do you work at Ashtabula?

A. In the new power plant.

Q. Where were you working in the summer of 1929?

A. On South State Street, Painesville.

Q. In the same capacity as store-room clerk?

A. Yes sir.

Q. Do you recall an occasion when Mrs. Meredith and some other person were injured at the railroad crossing down on Hardy Road?

A. I heard about it.

Q. I don't mean the exact date, but did you learn of the fact?

[fol. 229] A. Yes sir.

Q. Do you know where you were on that day?

A. I was down to Bill Carroll's cottage.

Q. He worked for the Illuminating Company at that time?

A. Yes sir.

Q. He had a cottage where?

A. Down at the lake at Sunset Point.

Q. You were working for the Illuminating Company at that time, both of you?

A. Yes sir.

Q. How did you happen to be down to Carroll's cottage?

A. I was supposed to be to the substation to learn the duties of trouble clerk. One of the fellows was going to be off and I was supposed to learn the duties of trouble clerk at the substation, and I had about a half an hour and he wanted me to go down to his cottage with him—he wanted to change some clothes, I believe.

Q. That was how you happened to be at his cottage that afternoon?

A. Yes sir.

Q. Some time that afternoon did you leave the cottage and come to Painesville?

A. Yes sir.

Q. About what time?

A. About four o'clock.

Q. Were you to go to work that afternoon or not?

A. No.

Q. Was he, do you know?

[fol. 230] A. Yes.

Q. Do you know what time he was to be on duty?

A. About four.

Q. Somewhere here at Painesville?

A. Yes sir.

Q. How did you leave his cottage, in an automobile?

A. Yes sir.

Q. His automobile?

A. Yes.

Q. Do you know what make it was?

A. Chrysler.

Q. When you left that cottage what road did you come on?

A. Well, that road went down on to Hardy Road.

Q. You came first on the lake road—a road parallel with the lake?

A. Yes sir.

Q. And then turned south on the Hardy Road?

A. Yes sir.

Q. He was driving the car?

A. Yes sir.

Q. You were with him on the front seat?

A. Yes sir.

Q. You knew there was a railroad crossing there, I suppose, on Hardy Road?

A. Yes sir.

Q. And you came up Hardy Road and crossed the railroad track, did you?

A. Yes sir.

[fol. 231] Q. When you crossed the railroad track what did you hear in the way of a signal or bell?

A. After we crossed?

Q. Yes.

A. I heard a whistle.

Q. How far south of the railroad track were you when you heard the whistle?

A. I would say about five hundred or six hundred yards.

Q. And you were still driving south on the Hardy Road at that time?

A. Yes sir.

Q. Did you hear more than one blast of the whistle?

A. I am not sure.

Q. What direction did the sound appear to come from?

A. From the east.

Q. And did you look in that direction?

A. Yes.

Q. When did you look in reference to the time that you heard the whistle?

A. I looked because I heard it.

Q. Did you look right away, at once?

A. Yes.

Q. What did you see?

A. Just an engine.

Q. Where was this engine that you saw?

A. Coming around the curve.

Q. Did you know before that that the F. P. & E. tracks came down towards the north from Painesville and then [fol. 232] turned west on Hardy Road?

A. Yes sir.

Q. And you looked across and saw an engine?

A. Yes sir.

Q. Was it on the curve when you saw it?

A. Yes sir.

Q. How soon did you see it there after you heard the whistle?

A. Right away.

Q. I don't know whether you heard a bell ringing or not?

A. No.

Q. Did you pay any further attention to that train?

A. No.

Q. You kept right on going?

A. Yes sir.

Q. Where did you go?

A. To Erie substation.

Q. Did you and Carroll go to the same place?

A. Yes sir.

Q. Did you learn later that there had been an accident at this crossing?

A. Yes sir.

Q. How soon after that did you learn that?

A. About a half an hour, or an hour.

Q. This engine that you saw back there on the curve—was there any cars attached to it?

A. I didn't notice.

Q. Did you notice in which direction it was headed?

[fol. 233] A. No sir.

Cross-examination.

By Mr. Marshman:

Q. Mr. Green, you say you heard a whistle. Do you mean by that one blast or a series of blasts?

A. Well, I didn't count them.

Q. You didn't count?

A. No.

Q. Do you think you heard more than one?

A. Yes.

Q. Didn't you tell me last week when you testified that all you heard was one whistle as a matter of fact?

A. I don't know.

Q. After you heard this whistle and looked around and saw the engine, where was the engine with reference to the Hardy Avenue crossing as to distance—about how far away?

A. About seven hundred feet, I should say.

Q. Now, after you heard it first at any rate it was on the curve when you first saw it?

A. Yes sir.

Q. After you heard it first, tell the jury whether or not you heard any more whistles—other short or long blasts?

A. I would not say for sure.

Q. After you heard the whistle you and Bill talked about hearing the whistle, did you?

A. When?

Q. Right there in the car as you were going along?

A. Yes.

[fol. 234] Q. What did you say to him in the car as you were going along and what did he say to you?

A. I cannot remember.

Q. You were talking as you came along?

A. Yes sir.

Q. And do you think that you spoke about the whistle at all?

A. He made a remark about it, yes sir.

Q. You believe that was about five hundred feet from the crossing?

A. The car, or what?

Q. The automobile, when you heard that, was five or six hundred yards—I beg your pardon?

A. Yes sir.

Q. When you were about five or six hundred yards from the crossing how far were you from the Merrill house, right there on the corner?

A. We were just about on the bend.

Q. That would be at least a quarter of a mile from the crossing itself?

A. I don't know.

Q. You then went to your place of business?

A. Yes sir.

Q. There was nothing unusual about this train whistle, was there?

A. No.

Q. As you went to your place of business how long was it before you heard from some source that there had been [fol. 235] an accident?

A. About half an hour or an hour.

Q. Are you familiar with the crossing down there—the Hardy Avenue crossing?

A. I am familiar with that one.

Q. You don't know of any other down there?

A. No.

Q. I think you told me before when I inquired, when you were up here before as a witness, that you told Mr. Dixon, or Mr. Dixon or somebody from the railroad came to you the next day?

A. I was called up.

Q. By whom?

A. I believe it was Mr. Dixon.

Q. He asked you to come and see him relative to the accident?

A. Yes sir.

Q. You went?

A. Yes sir.

Q. And there gave a statement which you signed?

A. Yes sir.

Q. And he gave you a copy of that?

A. Yes sir.

Q. What did you do with that copy?

A. I haven't got it.

Q. What did you do with it?

A. I lost it.

Q. You are now testifying entirely without any refreshment [fol. 236] of your recollection at all? You are now trying to give us what occurred two years ago?

A. Yes sir.

Q. You did not know that you were to be a witness in this case until told by your superintendent, is that right?

A. Yes sir.

Q. You are working in Ashtabula in the new power plant of the Electric Illuminating Company?

A. Yes sir.

Q. How far would you say that you would be away from the engine itself when you heard the blast?

A. Do you mean in a direct line?

Q. Yes.

A. Well, I would be about eight hundred yards or more.

Q. About how fast was that engine going?

A. I don't know.

Q. Which way was it headed?

A. I don't know; I did not notice which way it was headed.

[fol. 237] Milton Custin, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

Q. What is your name, please?

A. Milton Custin.

Q. Where do you live, Mr. Custin?

A. 4406 West 39th Street.

Q. Cleveland?

A. Cleveland.

Q. What is your business?

A. Superintendent.

Q. By whom are you employed?

A. The Cuyahoga House Wrecking Company.

Q. How long have you been employed by the Cuyahoga House Wrecking Company?

A. Nine years.

Q. How long as superintendent?

A. About eight years.

Q. In years past have you spent your summers in the vicinity of Painesville or not?

A. I have.

Q. Beginning about when?

A. 1929.

Q. Where did you live in the summer of 1929?

A. On the Hardy Road.

Q. Do you remember what time you came out that summer?

A. No; I do not recall.

[fol. 238] Q. Did your company have some work here in Painesville?

A. Yes sir.

Q. What was it?

A. The old Cleveland Trust Building.

Q. Taking it down?

A. Yes sir.

Q. Were you in charge of the work?

A. I was.

Q. You rented a place, as I understand it, on Hardy Road?

A. Yes.

Q. So you are familiar with the location of the Painesville Township Park?

A. Yes sir.

Q. And the Lake Road running east from it?

A. Yes sir.

Q. And Hardy Road?

A. Yes sir.

Q. Tell the jury where this cottage was that you occupied that summer with respect to the railroad track?

A. About a third of a mile down from the railroad track, towards the lake.

Q. Which side of the road?

A. The right hand side, going east.

Q. That would be on the east side of the road?

A. Yes sir.

Q. Did you know where the Meredith cottage was on the Hardy Road, while you were out there?

[fol. 239] A. Yes sir.

Q. Approximately how far south of the Meredith cottage?

A. About a third of a mile.

Q. Do you recall an occasion when Mrs. Meredith sustained some injuries at an accident at the crossing of the Hardy Road?

A. I do.

Q. Said ~~to be~~ July 19th, 1929—is that about the date?

A. Yes sir.

Q. Do you recall that afternoon where you were?

A. Yes sir, I do.

Q. Where were you?

A. On the front porch of the cottage.

Q. At home?

A. Yes sir.

Q. What were you doing?

A. Sitting on the swing.

Q. Had you been away that day and gotten home?

A. I had been away in the morning, yes sir.

Q. Not working in the afternoon?

A. Not in the afternoon, no sir.

Q. As you sat on the front porch of your cottage, in what direction would you be facing?

A. Facing Hardy Road.

Q. Was there anybody else about the house at that time?

A. My wife.

Q. Do you recall whether she was on the porch or inside [fol. 240] of the house or somewhere else?

A. She was just inside of the house.

Q. Not what you said—but were you having a conversation with her?

A. I did.

Q. Now, at the time while you sat there on the porch facing the Hardy Road, did you see any automobile go by your house going south on Hardy Road?

A. Yes sir.

Q. More than one?

A. Yes sir.

Q. Without going too much into detail, tell us what type of cars they were, if you can tell?

A. There was a sedan and a roadster and a big sedan.

Q. Take the sedan that you mentioned first, what kind of a car was that? Do you know?

A. No sir, I do not.

Q. Did you know who was in it?

A. No sir.

Q. That was the first one you saw going south as you sat there?

A. Yes sir.

Q. Was the roadster next?

A. Yes sir.

Q. What sort of a roadster, if you can tell?

A. It was a Ford roadster.

Q. And after that had gone, was there still another car [fol. 241] that you speak of as a big sedan?

A. Not at that time, no sir.

Q. Tell the court and jury how fast that car you spoke of as a big sedan was going when it went past your house.

A. I would say 35 miles an hour.

Q. It continued on south did it?

A. Yes sir.

Q. And while it was within the range of your vision can you tell the jury whether it increased or decreased its speed?

A. From where I was sitting, it increased its speed.

Q. Sometime later than that did you hear of the accident?

A. About half an hour afterwards or such a matter.

Q. After these cars went by you continued to sit there?

A. Yes sir.

Q. At any time did you hear any railroad signals, by whistle or bell, or anything of that kind?

A. I did.

Q. When did you hear such signal with reference to the time when what you describe as the "big sedan," went by?

A. The first signal, do you mean?

Q. Yes.

A. The big sedan was right about in front of our cottage.

Q. You heard the signal at that time?

A. Yes sir.

Q. What was that signal?

A. There was two long and two shorts.

[fol. 242] Q. Of what?

A. Blasts of the whistle.

Q. And you continued there on the porch, did you?

A. Yes sir.

Q. Did you hear any other whistle after that?

A. There was.

Q. Do you know how many blasts were sounded after that?

A. There were two longs and two shorts.

Q. Tell the jury if you knew at that time where the tracks of the F. P. & E. came down from Painesville and turned on a curve and crossed the Hardy Road? Did you know the location of the tracks in a general way?

A. Yes sir.

Q. You knew in a general way where the curve was?

A. Yes sir.

Q. Tell the jury where, as far as you could determine the engine was at the time you heard the first blast of the whistle?

A. The sound came from right about at the curve.

Q. Can you give the jury any idea how long an interval elapsed before you heard the next blasts of the whistle?

A. Around about five minutes, I would say.

Q. A short time?

A. Yes.

Q. Did you look at your watch?

A. No sir, I did not.

[fol. 243] Q. You could not see the train, as I understand you?

A. Absolutely not.

Q. When you heard the second blast of the whistle did you distinguish any difference in the location of the engine from where it had been when you heard the first blasts?

A. I could.

Q. Where had it progressed?

A. Towards Hardy Road.

Q. Now, you later learned, as you said that there had been an accident at this crossing?

A. Yes sir.

Q. How much later than when you heard these blasts of the whistle?

A. A half an hour or such a matter.

Q. I don't know whether you went up there?

A. Yes sir.

Q. Had the train been taken away at the time you got up there?

A. Yes sir.

Q. Now, you spoke of this car, which you describe as a large sedan going by when the first blast sounded. Did you afterwards learn whose car that was?

A. Afterwards, I did, yes sir.

Q. Whose car was it?

A. Mr. Meredith's.

Q. You are living in Cleveland, now?

[fol. 244] A. Yes sir.

Q. You have been out here summers since 1929?

A. Yes sir.

Q. 1930 and 1931?

A. Yes sir.

Q. And in the same general neighborhood?

A. Same neighborhood.

Cross-examination.

By Mr. Marshman:

Q. If I understood you correctly, while you were sitting on the front porch you saw three automobiles pass going south?

A. Coming towards Painesville, yes sir.

Q. That is south, isn't it?

A. Yes sir.

Q. You believe these automobiles were all going about how fast?

A. I should say around 35 miles an hour.

Q. Were any of them going faster than the others?

A. I would not say as to that.

Q. You were here as a witness last week, were you?

A. Yes sir.

Q. And I inquired of you, didn't *it*? I asked you questions?

A. Yes sir.

Q. I asked you at that time, didn't I, if the Meredith [fol. 245] car appeared to be going any faster than the other cars and you told me no?

A. I know I did.

Q. I asked you at that time if you were willing to swear that either one of those cars was going as fast as thirty miles an hour and you said no?

A. I believe I said 35.

Q. At that time your testimony was that you were willing to swear that the cars were going over 25 but not over 30, isn't that right?

A. I don't believe I did.

Q. Anyway there was nothing about the speed that attracted your attention?

A. No sir.

Q. Normal rate of speed for cars approaching that crossing?

A. The normal rate of speed.

Q. Were you familiar with the Meredith car before that day?

A. No sir, I was not.

Q. And if I understand you correctly, when you got up to the crossing you saw a car that resembled the car that you saw pass there?

A. Yes sir.

Q. What was the resemblance that you noticed?

A. Only the two women in the car—a woman and a girl, was the only thing.

Q. Don't you know that the women were not in the car when you got up there?

A. They were not.

[fol. 246] Q. Now, you have told Mr. Nolan that you heard eight distinct blasts of the whistle?

A. Yes sir.

Q. And your cottage, facing west, was at least one-third of a mile from the crossing?

A. Yes sir.

Q. Probably more?

A. It could be more.

Q. And you believe that you heard that whistle when the train was first at the curve approaching that crossing?

A. Approaching the curve or rounding the curve. It was right around the curve. I won't say it was on the curve.

Q. It was either on the curve or off the curve?

A. Yes sir.

Q. That is all you intended to tell the jury, isn't it?

A. Yes sir.

Q. And after you first heard it you heard two long and two short blasts?

A. Yes sir.

Q. And then you heard two long and two shorts again?

A. Yes sir.

Q. Tell us how far you think that engine was from the crossing when it gave its last whistle?

A. I think about half way between the crossing and the curve.

Q. And if it were stated to you as being the fact that that curve is about eleven hundred feet from the crossing, about half the distance would be where you heard the second blasts of the whistle?

[fol. 247] A. Yes sir.

Q. You heard the regular railroad crossing whistle—two long and two short?

A. Yes sir.

Q. You told us last week that your daughter and your wife's sister were walking up along the road?

A. Yes sir.

Q. And how long before you saw the Meredith car pass did they start up towards the road crossing?

A. Well, they had had time if they had walked, to be right up to the crossing, I would say.

Q. When you saw the Meredith car pass?

A. Yes sir.

Q. How old is your daughter?

A. She was seventeen then.

Q. A young lady.

A. Yes.

Q. And your wife's sister?

A. My wife's sister is 23 I believe; she is a cripple.

Q. Where is your daughter now?

A. She is here in Painesville.

Q. Was she here last week?

A. At the court here?

Q. No.

A. She is living here in Painesville.

Q. And your wife's sister?

A. Is teaching in Cleveland.

[fol. 248] Q. Was she in Cleveland last week?

A. Yes sir.

Q. You came from Cleveland to this trial?

A. Yes sir.

Q. And last week too?

A. Yes sir.

[fol. 249] Mrs. Milton Custin, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

Q. You are Mrs. Milton Custin?

A. Yes sir.

Q. Your husband just testified here?

A. Yes sir.

Q. Where are you living?

A. In Cleveland.

Q. In the summer of 1929 where were you living—in July, 1929?

A. On Hardy Road in Painesville, near Township Park.

Q. So then, your permanent address is in Cleveland and you were simply here for the summer?

A. That summer we were only out here in the summer.

Q. You were out here for the summer of 1929. Was that your first summer?

A. Yes sir.

Q. And 1930?

A. In 1930, we came and stayed.

Q. Stayed over the winter?

A. Yes sir.

Q. And during the ~~summer~~ of 1931?

A. Yes sir.

Q. When you lived here in the summer of 1929, you were on the east side of Hardy Road facing the Township Park, [fol. 250] were you?

A. Yes sir.

Q. Do you recall an occasion when there was an accident at the Hardy Road crossing, when Mrs. Meredith was hurt?

A. Yes sir.

Q. Do you know where you were on that afternoon?

A. I was just inside of the door of our porch.

Q. Your husband was home that afternoon?

A. Yes sir.

Q. Where was he about the place along about between three and four o'clock in the afternoon, if you can tell?

A. He was sitting on the porch.

Q. He was not working that afternoon?

A. No sir.

Q. And you were in the house, or on the porch, you say?

A. Just by the door.

Q. I don't know whether you noticed any automobiles go by your house that afternoon or not?

A. I did not notice them in particular. There was some passed.

Q. So that you could speak of anyone in particular?

A. No sir.

Q. While you were there in the location that you have described, tell the jury whether or not you heard any railroad train whistling?

A. Yes sir, I did.

Q. And can you fix the direction from which the sound appeared to come?

[fol. 251] A. It was coming from the east.

Q. Before that you knew in a general way, or didn't you know where the F. P. & E. tracks came down from towards Painesville and turned west on Hardy Road?

A. Yes sir.

Q. And, in reference to that curve where the tracks turned, tell the jury where it was that the sound of the whistle appeared to come from?

A. Apparently from about that point; about the bend.

Q. How many blasts did you hear as you recall it?

A. I could not say.

Q. Are you able to state whether you heard more than one or not?

A. Yes.

Q. But you don't know how many you heard, is that what you mean?

A. I do not know.

Q. Were there more than one blast?

A. Yes sir.

Q. You don't remember how many?

A. I do not, no sir.

Q. Were those blasts in quick succession or was there an interval between them as you recall?

A. I believe there was a short interval.

Q. Did you learn afterwards on that same day that there had been an accident on that crossing?

A. Yes sir.

[fol. 252] Q. About how long after you heard this whistling was it that you learned that there had been an accident?

A. I believe around half an hour.

Q. Did you go up there to the railroad crossing?

A. Yes sir.

Q. Was the train still there, or had it been taken away?

A. The train was taken away.

Q. No train there?

A. No sir.

Q. Was there anything that fixed in your mind the time when you heard the whistle blasts?

A. Yes sir.

Q. What was it?

A. My daughter and sister had just started to walk into Painesville, and I noticed the whistling particularly on that account.

Q. They were walking south on Hardy Road?

A. Yes sir.

Q. Going to Painesville?

A. Yes sir.

Q. And they had been gone, you say, just about long enough to have permitted them to have gotten up to the crossing?

A. Yes sir.

Q. Did you afterwards learn that, they had been picked up by and automobile and given a ride to Painesville?

A. Yes sir.

Q. How far, approximately, is your house—can you give [fol. 253] the jury any idea, from the railroad crossing down Hardy Road?

A. I judge between a quarter and half a mile.

Q. I am speaking of course in 1929, when this happened?

Cross-examination.

By Mr. Marshman:

Q. After your daughter and sister left your house state whether you saw them again—tell us the first time you saw them again.

A. I could not say exactly; they came back from Painesville probably an hour and a half later, or two hours.

Q. You saw no automobile pick them up?

A. No sir; I did not see it.

Q. When you heard the whistle of this train first you thought they had had about enough time to get up to the crossing, is that about right?

A. I did.

Q. And were you somewhat nervous about their ability to get over that crossing?

A. No.

Q. What were your nervous about?

A. Possibly someone might have picked them up.

Q. After you heard the whistle then, you had already considered them all the way up there, didn't you?

A. I don't know.

[fol. 254] Q. Was there a curve there that prevented you seeing up there, but by walking out to the road you would have had a straight view?

A. Yes sir.

Q. No difficulty at all if you had walked out to the road?

A. No sir.

Q. How far would that have been?

A. Probably about thirty or forty feet.

Q. Your house faced Hardy Road; that would be facing in the opposite direction from which the train as you afterwards learned came?

A. Yes sir.

Q. When you stated that you believed when you heard the first blast the train was about at that curve, did you mean that you intended to give that to us with any degree of definiteness?

A. As near as I could judge it was at the curve.

Q. Where was it when you heard the next series of whistles?

A. I could not say exactly.

Q. You would not want to give us any judgment on that?

A. I could not.

Q. But you are reasonably sure as a matter of fact—I think you have told us that you are positive that you heard whistles, and then an interval and then some more whistles?

[fol. 255] A. Yes sir.

Q. And that was all before the engine got to the crossing, was it?

A. Yes sir.

Q. You saw the engine at the crossing, did you?

A. I did not.

Q. When was the first time that you and your husband told Mr. Dixon about the whistling of this train?

A. In the summer of 1930.

Q. A little over a year after the accident?

A. About a year.

Q. How did you come to tell him about it?

A. He came to our house.

Q. He asked you if you had heard the whistles and of course you told him that you had?

A. Yes sir.

Q. Did you write out a statement and give it to him?

A. I did not at that time.

Q. When did you do that?

A. The following winter.

Q. Then, if I understand you correctly you had some conversation with him about it; at that conversation in the summer, did you mention about the whistling ~~or not~~, or do you remember?

A. I don't remember exactly.

Q. But you do remember that you afterwards, in the following winter, that would be in 1931, or the latter part of [fol. 256] 1930? You do remember of giving the statement?

A. I do.

Q. How and where was that given—at your home?

A. Yes sir.

Q. Was it typewritten?

A. Yes sir.

Q. Have you a typewriter at your home, or did they bring one and write the statement?

A. The gentlemen brought a typewriter to my home.

Q. You told all about the accident and he took it down and you signed it?

A. I read it and signed it.

Q. Did you take a copy of it?

A. I did not.

Q. Have you seen it since?

A. No sir.

Q. And if I understand you correctly, this statement that you are giving today is your present recollection of what occurred two years ago last summer?

A. It is.

Q. Whistling is not an unfamiliar thing at that crossing or any other crossing, is it?

A. No sir.

Q. When you first heard the whistle, did you have any difficulty in hearing? You lived about half a mile from the crossing, did you?

A. Between a quarter and a half.

[fol. 257] Q. Did you have any difficulty?

A. I did not.

Q. If I understand you correctly, it was a shrill whistle that no one would have any difficulty in hearing?

A. Yes sir.

Q. And every blast was of like shrillness?

A. Yes sir.

Q. And no one would have any difficulty in hearing the second series of whistles.

A. No sir.

Q. When you heard the first whistles, did you see automobiles going past the house?

A. I did not notice.

Q. Did you see a large sedan with women in it?

A. I did not notice in particular.

Q. Were you having some conversation with your husband at the time?

A. Yes sir.

Q. You were not standing there for the purpose of watching automobiles pass, of course, were you?

A. No sir.

Q. You were having the usual conversation with your husband that you have in your home life?

A. Yes sir.

Q. And I believe you told me in the other trial that there was some insurance man that afternoon?

A. Yes sir.

[fol. 258] Q. Did he come along in a short time?

A. Yes sir.

Q. When did he come along?

A. I judge in half an hour.

Q. Had you heard of the accident before that?

A. No sir.

Q. Who told you of the accident?

A. The insurance man.

Q. At one time you had lived around the corner, closer to the Merediths, hadn't you?

A. Yes sir.

Q. Did you tell anybody aside from the conversation with Mr. Dixon, of hearing the whistle that day?

A. I could not say exactly; possibly I have.

Q. Did you tell anybody connected with the railroad company of hearing that whistle up to the time Mr. Dixon came to your house?

A. No sir.

[fol. 259] **William Conlin**, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. Your name is William Conlin?
A. William Conlin.
Q. You live in Painesville?
A. Yes sir.
Q. Are you married?
A. Yes sir.
Q. You have a family?
A. Yes sir.
Q. Where do you live in Painesville?
A. 737 East Erie Street.
Q. How long have you lived in Painesville?
A. I have lived here since 1911.
Q. What is your business?
A. Railroad brakeman.
Q. How long have you been engaged in that business?
A. I have been with the F. P. & E. about 13 years.
Q. Were you in the railroad business prior to that time?
A. Yes sir.
Q. For what company?
A. New York Central.
Q. Now, on the day of the accident, said to have been July 19th, 1929, were you engaged in braking that day for [fol. 260] the F. P. & E. Railroad?
A. Yes sir.
Q. And were you on this cut of cars that were involved in this accident?
A. Yes sir.
Q. Were you head brakeman or rear brakeman?
A. Rear brakeman.
Q. Now, on that day you brought that cut of cars down from the New York Central interchange, did you not?
A. Yes.
Q. You had gone up there from Fairport, and then were bringing down a string of cars from the New York Central interchange?
A. Yes sir.

Q. Was there a caboose on that cut of cars?

A. No sir.

Q. Any markers on the cars?

A. No sir.

Q. Where were you riding?

A. On the rear end of the rear car

Q. What kind of car was that?

A. It was a car of coal.

Q. A hopper car?

A. A hopper car.

Q. You are familiar with the Hardy Road crossing, I presume?

A. Yes sir.

[fol. 261] *A. Yes sir.*

Q. When you approached that crossing, what signals, if any, did you hear sounded?

A. I heard two long and two short blasts of the whistle.

Q. Are you able to state about where the engine was at the time that signal was sounded?

A. Somewheres on the straight track on the west end of the curve.

Q. The train, I suppose, continued to move on toward the crossing after that signal?

A. Yes sir.

Q. I think you said that you did not hear the bell sounded.

A. No sir.

Q. Was the distance too great to the rear of your train to hear it?

A. Why, I would not say. Sometimes you can hear it and sometimes you can't; but I did not hear it that day.

Q. Do you know whether that crossing signal was sounded more than once or not?

A. It was sounded twice.

Q. And what was the first that you noticed of anything out of the ordinary that day?

A. The train bunched up.

Q. What do you mean—jolted?

A. Jolted up.

Q. What caused that?

A. An application of some kind on the engine.

[fol. 262] Q. Of the brakes, do you mean?

A. Of the brakes.

Q. What effect did that have upon your rear car?

A. Bunched the car up like that—jolted it.

Q. A severe jolt or what?

A. Kind of a severe jolt.

Q. From that time on what is the fact as to whether or not the train slowed down?

A. Yes sir; it slowed down.

Q. And finally came to a stop?

A. Yes sir.

Q. Did you stay on the rear car until it came to a stop?

A. Until it stopped, yes sir.

Q. At that time did you know that there had been an accident?

A. No sir.

Q. What did you do then?

A. I got off of the rear car and walked up to the Hardy Road crossing.

Q. When you got up there did you learn of the accident?

A. Yes sir.

Q. Did anyone give any directions to you—not what they were—but did anyone give any directions to you at Hardy Road crossing?

A. No sir.

[illegible] Perhaps you do not understand. When you arrived at Hardy Road crossing did anyone give you any directions?

A. No sir.

[fol. 263] Q. Did anyone at any time that afternoon, after that accident, give you any directions as to what to do?

A. No sir.

Q. What did you do?

A. I climbed through the cars and went up the road to the first house south of the railroad track.

Q. Is that the Merrill home?

A. The Merrill home.

Q. That is in plain sight of the railroad, is it not?

A. Yes sir.

Q. And did you do some telephoning there?

A. Yes sir.

Q. And did you tell the lady of the house that there had been an accident, and ask leave to use the phone?

A. Yes sir.

Q. After you had done that, what did you do next?

A. I went back to the crossing.

Q. On your way to the Merrill home did you hurry?

A. I got into a machine and hurried there as fast as I could.

Q. Did somebody take you up in a car?

A. Yes sir.

Q. Somebody that came down the road from the south?

A. They came from the south.

Q. And turned around and took you back?

A. Yes sir.

Q. I don't know whether you know who that was or not?

[fol. 264] A. No, I do not.

Q. After you had done this telephoning, what did you do then, Mr. Conlin?

A. I came back to the crossing of Hardy Road and then went back towards the engine and asked a party back there who was in the accident.

Q. When you got back there, were the men working to get the women out, or had they gotten them out at that time?

Q. I believe they were. I hadn't gone around to the back end yet.

Q. Did you see the women in the car at all?

A. No sir.

Q. When you got back from that telephoning, they had been taken out?

Q. Did you see the women in the car at all?

A. No sir.

Q. When you got back from that telephoning, they had been taken out?

A. No sir, they had not.

Q. I understood, you—perhaps you misunderstood me—I understood you to say that when you got there you did not see the women in the car.

A. No sir.

Q. You did not see them?

A. No sir.

Q. Did you go right down there to that place?

A. After I came from the telephone.

Q. When you got back—this is the question, Mr. Conlin—when you got back and went down there to the head of the engine, had the women been removed from the car?

A. I don't know.

[fol. 265] Q. What did you do?

A. I then went back to the crossing again.

Q. What did you do there?

A. I got up on top of a coal hopper to see if the New York Central switch engine was coming down behind.

Q. Had you gotten word to anyone to bring that down?

A. No. I had not.

Q. You knew word had been sent?

A. Yes sir.

Q. After you had done that, did you go back to the engine?

A. Yes sir.

Q. The tender was the farthest towards the west, was it not?

A. Yes sir.

Q. This engine was pulling this string of cars and moving backward, was it not?

A. Yes sir.

Q. Now, did you note the position of the tender and the automobile?

A. No, I did not.

Q. Did you notice the rear wheels—the wheels on the rear truck of the tender?

A. Yes sir.

Q. What is the fact as to whether they were raised from the rails?

A. Yes; one wheel.

Q. About how much?

[fol. 266] A. I should say about six inches.

Q. And the other one was on the track?

A. I could not say.

Q. At any time did you go down under, or partially under the tender?

A. Yes sir.

Q. To see what the condition was down there?

A. Yes sir.

Q. For the purpose of seeing whether there was anything you could do to release the automobile?

A. Yes sir.

Q. When you were in that position, did you notice anything about the wheels of the tender?

A. I noticed oil on one wheel.

Q. Did you notice anything about the wheels, either then or afterwards, of the engine—the driver wheels?

A. No sir.

Q. You had no part, yourself, in taking the women out of the car?

A. No sir.

Q. Now, was this cut of cars separated at the crossing or were they backed up clear across it?

A. They were pulled up over the crossing.

Q. What pulled them up, do you know?

A. A New York Central switch engine.

Q. Had pulled them towards the east?

A. Yes sir.

[fol. 267] Q. Until they were clear across the Hardy Road crossing? to the east?

A. Yes sir.

Q. And was that after the women had been taken out or before?

A. After the women had been gone.

Q. Then, a little later that afternoon, this engine and cut of cars proceeded west again down to its destination near Fairport?

A. Yes sir.

Cross-examination.

By Mr. Anderson:

Q. Your name is what, please?

A. William Conlin.

Q. And you were the rear brakeman?

A. Yes sir.

Q. And you had a conductor and another brakeman, a locomotive engineer and a fireman?

A. Yes sir.

Q. That completed the whole crew?

A. Yes sir.

Q. The crew had taken the train of cars down to the intersection, or where you connected with the New York Central, had you not?

A. Yes sir.

Q. I understand that was a train of 40 cars that you [fol. 268] took down?

A. I don't know; quite a number of cars.

Q. Where did you ride on that train?

A. On the rear car.

Q. Caboose?

A. No sir.

Q. No caboose?

A. No sir.

Q. When you got those cars, assuming there were 40, down to the connection with the New York Central, what was done with those cars?

A. They went into a small siding there and the New York Central hooked on to them and pulled them out.

Q. That was a New York Central siding?

A. No; it is a F. P. & E. siding.

Q. Belongs to your railroad?

A. Yes sir.

Q. They were left there with them, were they?

A. Yes sir.

Q. Did you ever seen them after that? I am speaking of the train that you took down to the New York Central connection. You never saw them after that as far as you know?

A. No sir.

Q. Where did you get those cars—up at the yard of the Diamond?

A. Yes sir.

[fol. 269] Q. And in going from the Diamond now—in going down to the New York Central connection, did you stop in taking those cars down at all?

A. Yes sir.

Q. Where?

A. Stopped at what we call the Shore Club, at the east end of the Diamond plant there.

Q. After you coupled on to those forty cars in the Diamond yard, did you stop until you got to the New York Central?

A. Not after we left down in the lower yard, we did not.

Q. Did you uncouple the locomotive engine—is that the front brakeman's place?

A. Yes sir.

Q. Where did you go after those cars were taken to the New York Central?

A. I rode up as far as the switch on our own engine.

Q. And the engine was in forward motion taking those cars down there, was it not?

A. Yes sir.

Q. And then id backed to some cars shortly after that, did it not?

A. It headed up into some cars.

Q. The head of it coupled on, put it that way?

A. Yes sir.

Q. About how far were those cars that you coupled on from those cars that you left down there?

[fol. 270] A. I would say a quarter of a mile.

Q. What did you ride in, in going over that quarter of a mile?

A. Going up to get those cars?

Q. When you went over to those 32 cars, what did you ride on?

A. On the head end of the engine.

Q. When you got to those 32 cars, they were standing there coupled together, were they not?

A. Yes sir.

Q. Standing on the New York Central siding by themselves, or where were they?

A. There is a two-track siding there of the New York Central.

Q. And those cars were of different kinds, some loaded and some empty, and some hopper and other cars, were there not?

A. Yes sir.

Q. You and the conductor, after you got over there, walked down along the track where those 32 cars were standing, did you not?

A. No sir.

Q. Now, stop and think a moment, please. You got down to where those 32 cars were standing—and didn't you go down on one side of them and the conductor on the other, until you got to the rear end?

A. Not at first.

[fol. 271] Q. Where were you first?

A. On top of the cars.

Q. You went from one along to the other on top of them?

A. No sir; four or five cars I went over and then I got down.

Q. And then you went to the rear end of the train?

A. Yes sir.

Q. And you went about four or five cars on the top?

A. Yes sir.

Q. And then you got down and walked along the side?

A. Yes sir.

Q. And walked along the opposite side from the conductor, did you not?

A. I believe I walked on the south side.

Q. The conductor did not walk on the same side that you did, did he?

Counsel for defendant objected to the question.

Q. Well; you got down to the rear of the train?

A. Yes sir.

Q. And about how long did you stand there before the train started?

A. I don't remember; probably three or four minutes.

Q. And then the train started?

A. After getting the signal he backed up.

Q. And it did not stop again until the accident, did it?

A. Yes sir.

Q. Where?

[fol. 272] A. Stopped down at this side of what we call Fairport Road.

Q. You testified here at the trial of the case of the daughter the other day?

A. Yes sir.

Q. Didn't you say it did not stop until it got to the place of the accident—didn't you testify to that the other day?

A. I might have; but I recall that it did stop.

Q. You would not say you did not so testify, would you? Don't you remember my asking you that question?

A. No, I do not.

Q. Well; why did you stop? You say you did. Why did you stop?

A. It is a stop that we must stop at. It is a stop sign.

Q. Well, after a while you got up near to this crossing where the accident happened, and you did not notice anything until the jar of the train?

A. No sir.

Q. That was the first you noticed?

A. Yes.

Q. And the train then went on and at last stopped?

A. Yes sir.

Q. And you got off of the rear of the train after it stopped, and walked to the other end of it?

A. No sir.

[fol. 273] Q. You walked to where the locomotive engine was, didn't you?

A. Not at first.

Q. Did you eventually go down to the engine?

A. Yes.

Q. Where did you walk to first?

A. I walked to the Hardy Road crossing.

Q. About how far was the road crossing from where you got off and walked toward the front of the train?

A. About fourteen or fifteen car lengths.

Q. After a time you got down to the front end of the train. By the way—you did not have any air in your train did you?

A. No sir.

Q. On 32 cars you did not have any air brakes operating at all?

A. No sir, not on the cars.

Q. So there will be no question about it: There was not a single, solitary brake on the 32 cars where the brakes could be set by air?

Counsel for defendant objected to the question.

Mr. Blakely: The fact that there was no air on those cars is admitted in the answer.

The Court: The objection is sustained. There is no dispute about that proposition.

Q. Tell us, was there any air on any one of those 32 cars?

[fol. 274] A. No sir; none that I know of.

Q. None of the brakes could be controlled at all by air on any one of those 32 cars?

Counsel for defendant objected to the question. The court sustained the objection.

Q. Was there any whistling post at this Hardy Road?

Counsel for defendant objected to the question.

The Court: That is immaterial. It is not necessary to go into that.

Counsel for plaintiff excepted to the ruling of the court.

Q. And then you got down to where the locomotive engine was?

A. Yes.

Q. Did you see any automobile when you got down there?

A. I seen part of one.

Q. Where was it?

A. Towards the rear end of the tank, or tender.

Q. Where the engine was running in backward motion and pulling the train?

A. Yes sir.

Q. And the sloping part of the tender was the farthest from the train, the front part of the train?

A. It was the front part of the train going to the west.

Q. About how high from the rails is the highest part of the tender on that train?

A. I don't know; I never measured it.

[fol. 275] Q. Much higher than your head?

A. A good deal higher.

Q. And at the rear end it sloped down?

A. Yes.

Q. About a 45 degree slope?

A. Yes sir.

Q. Was there any ladder laying over the sloping part of it?

A. On the side there is a guide post—a hand rail.

Q. At the extreme front part of the tender there is a foot board?

A. Yes sir.

Q. And that foot-board extended clear across the tender?

A. Yes sir.

Q. And the tender was four feet eight and a half inches wide—that is the distance the rails are, and extended over on each side about 24 inches?

A. Yes sir.

Q. When you got down there, did you go in under the engine or under the tender?

A. Not the first time.

Q. Did you at all, please?

A. Yes sir.

Q. How soon after getting there did you go under the tender?

A. Probably a couple of minutes.

Q. Did anybody direct you to get under the tender?

[fol. 276] A. No sir.

Q. Why did you get under?

A. I heard somebody say if they could get a pry.

Q. What kind of a pry?

A. I suppose they wanted to pry somewheres—to pry something.

Q. I don't know as I understand you, please—what do you mean by a "pry"?

A. They wanted to get under something and lift it and jack it up.

Q. Lift up the tender?

A. I don't know what it was. I wasn't around the back end.

Q. Did you expect to find a pry under the tender?

A. No sir.

Q. You did get in under the tender?

A. Yes sir, I did.

Q. What did you go under the tender for?

A. To see if there was a place to pry.

Q. Where did you look?

A. I looked toward the south side.

Q. How many wheels were under the tender?

A. Eight.

Q. Did you find a pry?

A. No sir.

Q. You did not have any pry at all?

A. No sir.

[fol. 277] Q. Now, while you were under the locomotive, engine and tender, was it wholly because of the pry that you went under there?

A. No sir.

Q. Nobody had a pry at that time?

Counsel for defendant objected to the question.

The Court: I think this is taking up considerable time.

A. No sir.

Q. Did anybody have any pry at all while you were there?

A. Not that I seen.

Q. Now, while you were under there you saw, you say, some oil on one of the tender wheels?

A. Yes.

Q. And that wheel was off the track?

A. Yes sir.

Q. Was there anything under the wheel that you could see?

A. The rail below the wheel.

Q. The tender weighs a hundred thousand pounds—it is in evidence that it weighs a hundred thousand pounds. Could you tell the jury what made one of those wheels up off the railroad?

A. I could not see anything, unless riding up on some part of the machine—some part of the tender was on the machine.

Q. Something caused some part of the tender, which [fol. 278] weighed a hundred thousand pounds to be up off the rails?

A. Yes sir.

Q. That was the only oil you saw?

A. Yes sir.

Q. And you did not see any sand, did you, at all?

A. No sir.

Q. And the sand is white?

A. Yes sir.

Q. You know where U. S. 20 is, the highway, you know where the big highway is where people go from Buffalo to Cleveland and Cleveland to Buffalo?

A. Yes sir.

Q. Did you stop there?

A. Not coming down, we did not, no sir.

Q. Did you stop there at all and send out a flagman?

Counsel for defendant objected to the question. The court sustained the objection. To which ruling of the court counsel for plaintiff at the time excepted.

[fol. 279] JOHN FITZGERALD, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. Mr. Fitzgerald, what is your first name?

A. John.

Q. Where do you live?

A. 489 Owego Street, Painesville.

Q. How long have you lived there?

A. About twenty years.

Q. You live there with your mother?

A. Yes sir.

Q. What is your business?

A. I am a railroad brakeman.

Q. How long have you been a brakeman?

A. About sixteen or seventeen years.

Q. And how long have you been brakeing for the F. P. & E. railroad?

A. I guess eight or nine years—something like that.

Q. On the day of the accident to Mrs. Meredith—do you remember that occasion?

A. Yes sir.

Q. Said to be July 19th, 1929. Were you on that cut of cars or on the tender that day?

A. Yes sir.

Q. You were coming down from the New York Central interchange?

[fol. 280] A. Yes sir.

Q. And the New York Central interchange is just south of the North Ridge Road, is it not, over here by Henry Kohankie's?

A. Yes sir.

Q. Henry Kohankie's greenhouses and nursery?

A. Yes sir.

Q. And from there it goes northwesterly and finally turns west and goes down to Fairport, is that right?

A. Yes sir.

Q. On that day at the time of the accident this cut of cars was being hauled down from the New York Central interchange towards Fairport?

A. Yes sir.

Q. Do you know where the Hardy Road crossing is?

A. Yes sir.

Q. As you approached that crossing on that occasion will you state whether or not any signals were sounded by the engineer?

A. Yes sir, he blowed the ordinary crossing whistle.

Q. What is the ordinary crossing whistle?

A. Two long and two short.

Q. Do you know whether it was blown more than once?

A. It was blown twice.

Q. Where were you riding at the time?

A. I was on the foot-board at the back of the tender or tank.

Q. The tank and the tender is the same thing, I take it, only we speak of the tender and you call it the tank?

A. Yes.

[fol. 281] Q. You were on the back end of the tender?

A. Yes sir.

Q. The foot-board was the first thing which would approach and go over the crossing, was it not?

A. Yes sir.

Q. The thing upon which you were riding was the first thing that came to the crossing and passed over?

A. Yes sir.

Q. When you approached that crossing on that occasion what is the fact as to whether or not you saw an automobile coming from the north going south?

A. Yes sir.

Q. Give us your best judgment of the rate of speed of that automobile when you first saw it?

A. Probably around thirty-five miles an hour, I should say.

Q. What did you do when you saw it?

A. I gave the stop sign to the engineer.

Q. You gave the stop signal by waving your hand?

A. Yes sir.

Q. The tank was between you and the engineer, was it not?

A. Yes sir.

Q. How did you make that signal?

A. With my left hand.

Q. Where did you wave your left hand?

A. To the south of the tank.

Q. In other words, you carried it beyond you—you were standing on the running board facing the west?

[fol. 282] A. Yes sir.

Q. And the tender was going west?

A. Yes sir.

Q. And when you saw this automobile you waved your hand outside of the tank, is that right?

A. Yes sir.

Q. What happened when you did that?

A. Why, he applied the brakes right away.

Q. The brakes went on, did they?

A. Yes sir.

Q. Did you feel the effect of them?

A. Yes sir.

Q. In what way?

A. The vibration of the tank, I guess.

Q. A jolt?

A. Yes sir.

Q. And what were you doing in the meantime?

A. I was getting out of there pretty fast.

Q. Where were you going?

A. I went back up the tank.

Q. What did you have to do to get back up the tank?

A. Just climb up—step on the coupler and step up.

Q. Was there a hand rail or something to take hold of there?

A. Yes.

Q. And then did you stay upon the tank until the train came to a stop?

A. Yes sir.

[fol. 283] Q. Now, the automobile, what happened to it?

A. Well, it slid along in front of it.

Q. Slid along the tracks until the time it stopped?

A. Yes sir.

Q. Where did the tender strike the automobile—at what point on the ground, about, was it at the crossing or where?

A. It was west of the crossing a little bit.

Q. What did you see the automobile do as it came near to the track?

A. Well, the woman driving it kind of sheered over to the west.

Q. Over to the right?

A. Yes, to the right.

Q. Sheered over to the right-hand?

A. Yes.

Q. And what did she do—did she keep right on going?

A. Yes sir.

Q. And what happened—did her car go on the tracks finally?

A. Yes sir.

Q. And where with reference to the tender?

A. Right straight across in front of it.

Q. And was that the place where she was hit?

A. No, she was hit before, I think, a little bit.

Q. Was she hit before she got entirely across the rails—is that your idea?

A. Yes sir.

Q. But shortly after she was hit where were the wheels of her car?

[fol. 284] A. They were halfway across the rails, I guess you would call that.

Q. Where were the front wheels of her auto—about on the south rail?

A. Not fully at that time, I don't believe.

Q. Well, approximately?

A. Yes.

Q. But eventually they were right at the south rail?

A. Yes.

Q. Now, when you came to a stop what did you do then, Mr. Fitzgerald?

A. I got off and went around there.

Q. What did you do—did you aid in getting this woman out?

A. Yes sir.

Q. And Mr. Doubledee, I think, the conductor, was also working at it?

A. Yes sir.

Q. And others?

A. Yes sir.

Q. And without going into details of it, you broke into the car and got these ladies out, is that right?

A. Yes sir.

Q. Which one was taken out first?

A. The young girl.

Q. Did the ambulance take her away?

A. Yes sir.

Q. And then the mother was taken out?

A. Yes sir.

[fol. 285] Q. And the ambulance took her away?

A. Yes sir.

Q. After that what was done with this cut of cars?

A. Well, they pulled them back.

Q. What pulled them back, if you know?

A. We had a New York Central locomotive come back and pull them back.

Q. That came from the south, I suppose, down these same tracks that you had come over?

A. Yes sir.

Q. And hitched on to the rear and pulled the train east from the crossing, is that right?

A. Yes sir.

Q. And then, a little later it was pulled west again down to Fairport?

A. Yes.

Q. How far over the crossing would you say you were when the collision occurred between the auto and the tender?

A. The length of the tank, I guess.

Q. Mr. Fitzgerald, I overlooked asking you about the bell—how about that—as you approached the crossing at the time the whistle was blown?

A. It was rung.

Q. How long did it ring?

A. It rung until we struck the automobile, I guess.

Q. Did you notice the rails—one or both of the tracks—west of the crossing after the accident down to the point [fol. 286] where the automobile was lying?

A. Yes sir.

Q. What was the condition of the automobile as to being smashed?

A. It was right down against the rails.

Q. What was the fact as to whether or not the automobile had been smashed considerably—take this photograph which is marked "Plaintiff's Exhibit 2"—does that look something like the car did on that day, or don't you remember how it looked?

A. I don't remember.

Q. But it was smashed?

A. Considerably smashed.

Q. Did you notice oil on the rail?

A. Considerable oil on the rail.

Q. On which rail?

A. On the north rail that I noticed.

Q. How far did you notice it coming back?

A. Probably a hundred feet—something like that.

Q. From where?

A. From the crossing.

Q. Do you mean it started a hundred feet west of the crossing?

A. The first I noticed it was probably a hundred feet from the crossing and about a hundred feet beyond.

Q. About a hundred feet along on the tracks on the steel rail?

A. Yes sir.

Cross-examination.

[fol. 287] By Mr. Anderson:

Q. Mr. Fitzgerald, you testified the other day in a case here of the Meredith girl against the same railroad, did you not?

A. Yes sir.

Q. How soon after this accident did you sign a statement, if you did sign a statement?

A. I think it was two days later.

Q. Where were you when you signed it?

A. I was in the F. P. & E. general office.

Q. Was it typewritten?

A. Yes sir.

Q. You signed your name at the bottom of it?

A. Yes sir.

Q. After you signed that statement—have you seen that statement from the time that you signed it until the present time?

A. No sir.

Q. No one has read it to you at all?

A. No sir.

Q. Do you remember, Mr. Fitzgerald, if there was anything in that statement about oil?

A. I don't remember.

Q. Do you remember whether there was anything in that statement about the Meredith machine going off into the ditch?

A. Yes sir.

Q. You don't remember about the oil but you remember [fol. 288] about the ditch—I see. Your deposition has been taken twice by me, has it not?

A. Yes sir.

Q. Here in the city of Painesville?

A. Yes sir.

Q. And there were present Mr. Blakely and Mr. Dixon, as I remember it, and yourself and a notary public and Mr. Marshman, and myself—just a few of us there?

A. Yes sir.

Q. You were sworn to tell the truth?

A. Yes sir.

Q. And then you were asked certain questions?

A. Yes sir.

Q. Now, on this day of the accident how wide was that step that you were standing on?

A. Do you mean the foot-board itself?

Q. Yes, the foot-board.

A. Possibly ten inches, or twelve—no, it is not that much, about ten inches.

Q. And it extended the full width of the tender?

A. Yes sir.

Q. And where were you standing—in the middle, or left or right, in the direction you were going?

A. To the left.

Q. And this automobile came from your left or your right—probably from your right?

A. Yes sir.

[fol. 289] Q. What were you holding on to, if anything—just standing there?

A. There is a gadget there to hang on to—a handle.

Q. No steps or anything else there so that you could climb up if you wanted to?

A. There is a handle there.

Q. Was that on the slanting tender or where?

A. Slanting tender.

Q. What angle is that—about forty-five degrees?

A. Yes sir.

Q. Pretty steep?

A. Yes sir.

Q. Of metal, isn't it?

A. Yes sir.

Q. It is difficult to climb up if you can't use the hand holds?

A. Yes sir.

Q. Where were the hand holes—on the right-hand side or middle of the tender in that direction that you were going?

A. On my left.

Q. Right where you were standing?

A. Yes sir.

Q. Nice day—sunshiny and everything?

A. Yes sir.

Q. When you came down somewhere near this crossing where the accident happened, the whistle sounded?

A. Yes sir.

Q. How many blasts of the whistle?

[fol. 290] A. Two long and two short.

Q. And that was all—two long and two short?

A. That time, yes.

Q. Was there any whistle just before that for this crossing?

A. Twice they sounded the crossing whistle.

Q. How many toots all together—you have told us about two short and two long—was there any others at that crossing?

A. Well, twice. He did it twice, two long and two short.

Q. What was the crossing immediately above—the New York Central, wasn't it?

A. Yes sir.

Q. How far was the New York Central from this crossing where the accident happened?

A. I don't know how far that is.

Q. It is really a short distance, isn't it, in car lengths? Well, we have got it on the map. All right. Now, please tell the jury after you crossed the New York Central crossing how many toots of the whistle was given before the accident.

A. About eight, I guess.

Q. How many toots of the whistle were given for the New York Central crossing?

Counsel for defendant objected to the question.

The Court: He says he does not know.

Q. You don't remember that at all?

A. No sir.

Q. You remember eight for this other, do you?

[fol. 291] A. Yes sir.

Q. How far was that automobile from the first rail of your track when it went down in the ditch? You told us the other day how far.

A. I told you I did not know.

Q. You told us the other day, now tell us again.

Mr. Blakely: Are you testifying or is he testifying?

Mr. Anderson: Answer the question, please.

The Court: You may ask him if he said so the other day.

Q. You told us the other day—please tell us again.

A. I don't think I told you any distance; I don't remember.

Q. Just last week don't you remember of me asking you that question and you telling me how many feet the automobile was from your first railroad rail where it went down in the ditch?

A. No sir.

Q. Forget everything in the past. How far do you say now?

A. I don't know how far it was.

Q. Haven't you any idea?

A. No sir.

Q. Ten feet?

A. It might have been that. I was pretty busy.

Q. Would you say twenty-five feet?

A. Might have been that.

Q. Would you say fifty feet?

A. It might have been that.

Q. Would you say a hundred?

[fol. 292] A. I would say it wasn't a hundred.

Q. You were there—you could tell us?

A. I could not tell you; I don't know.

Q. Where was your tender—the part of the train upon which you were riding, with reference to the road crossing when you first saw the automobile—do you understand my question?

A. Yes, I understand.

Q. You did see the automobile as you went down there—the Meredith automobile—didn't you?

A. Yes sir.

Q. Where was the tender on which you were riding with reference to that crossing when you saw the automobile first?

A. I don't know how many feet it was. It was within the range of them trees is all I can say when I first saw the car. I don't know how far it was.

Q. You have not any idea at all?

A. No sir.

Q. I refer to the second time when your deposition was taken, on the 24th day of June, 1931—do you remember of this question being asked you—"Did you not testify before, sir, that part of the tender was on the road crossing before you saw the Meredith machine"—and did you answer, "I believe I did"—did you so testify?

A. I don't remember that.

Q. Well, at that time you were telling me the truth, were you not? At that time you apparently remembered where the automobile was and where your tender was when you [fol. 293] first saw it—is that correct or not?

A. I don't remember that.

Q. Mr. Fitzgerald, you are under oath.

A. Yes sir.

Q. Do you remember anything about the accident, or don't you?

Counsel for defendant objected to the question. The Court overruled the objection; to which ruling of the Court counsel for defendant at the time excepted.

Q. Do you remember where the tender was when you first saw that automobile?

A. Yes sir.

Q. Where was it?

A. It was on the railroad.

Q. When you say road, you mean the highway?

A. I mean the railroad.

Q. The railroad was rather long?

A. Yes sir.

Q. Where in reference to the highway—the paved roadway, when you first saw the automobile?

A. It was not on the highway—the tank.

Q. Where was it?

A. It was back.

Q. How far back?

A. I don't know.

Q. How do you know it was not on the road?

A. I know it was not on there, but I don't know how many feet it was.

Q. Why did you tell me last June when your deposition [fol. 294] was taken when you were under oath, that your tender was on the highway when you first saw the Meredith machine?

A. I don't remember saying that.

Q. When your first deposition was taken didn't you say at that time that your tender was on this highway at the time you first saw the automobile?

A. I don't remember making such a statement.

Q. You commenced to climb up on top of the tender, did you not, when you first saw the automobile?

A. Yes sir.

Q. You saw that there was probable danger of a collision, did you not?

A. Yes sir.

Q. And then you commenced to climb up—you were standing right there and commenced to climb up by the handholds that slanted along that tender, did you not?

A. Yes sir.

Q. Where did you climb to?

A. Clear up on top of the coal.

Q. How many handholds in going up?

A. I don't know how many there was, I never counted them.

Q. Six, or eight, or ten?

A. Maybe six.

Q. You were climbing as fast as you could, I suppose?

A. Yes sir.

Q. You were in a hurry?

A. Sure.

Q. Where was the Meredith machine when you com-[fol. 295] menced climbing up on the hand holds?

A. It was coming down the road.

Q. I presume it was—but how near to the track was it when you commenced climbing up those hand holds?

A. I don't know how close it was.

Q. It was close enough so that you were getting out of there, is that it?

A. Yes sir.

Q. While you were climbing up your face was toward the slanting tender, was it not?

A. Yes sir.

Q. And while you were climbing up of course you did not then see the Meredith automobile at all—while you were climbing up?

A. No sir.

Q. After you got on the coal where was the Meredith automobile when you next saw it, if you did see it?

A. It was right upon us.

Q. Right down in the ditch there?

A. It was right square across the track in front of us.

Q. Was the Meredith machine down in the ditch before you commenced to climb?

A. I don't remember that exactly.

Q. Won't you try to remember for us and tell us that?

Counsel for defendant objected to the question.

The Court: He says he does not remember.

Q. Before you commenced to climb, give us your best recollection—was the Meredith machine in the ditch or [fol. 296] on the highway?

A. It was right behind the tender.

Q. There was no danger of any collision, was there, when it went down into the ditch?

A. No sir, not while it was down there.

Q. You was climbing up the tender here because it was then on the highway and there was then danger of a collision?

A. No, I climbed up the tank after it hit.

Q. By the way, there was an orchard as you came down there on your right, was there not?

A. Yes sir.

Q. And along the highway, probably eight hundred or a thousand feet that orchard extended?

A. Yes sir.

Q. A big orchard?

A. Yes sir.

Q. I call your attention here to a photograph that was taken three or four days after the accident. That is the orchard, is it not?

A. Yes sir, that is it.

Q. Now, as you come up along here where your tracks run parallel with the orchard you could not see anybody coming on the highway, could you?

A. Yes sir, you could for a ways.

Q. You could not look through the orchard and see anybody coming on that highway?

A. Yes, there is a space there that you could.

Q. Did you testify last week that you could not?

[fol. 297] A. No sir.

Q. Do you say that you did not?

A. Yes sir.

Q. You see this post here with the cross-arm at the top?

A. Yes sir.

Q. Those posts are ten to twelve feet high, but these orchard trees are higher than the posts. Could you see over the orchard or under the trees?

A. You could see through them.

Q. Have you talked with anybody about this case since you testified last week?

A. Yes sir.

Q. When your first deposition was taken do you remember of saying then that the first whistle was given when you were twenty-five car lengths away from the crossing?

A. Yes sir.

Q. You remember testifying to that?

A. Yes.

Q. And that is correct, is it?

A. Yes sir.

Q. When was it that you made any examination, if you did make an examination, for oil, after the accident?

A. I noticed it from about twenty-five feet from the crossing.

Q. After the accident you went on and delivered the train in the Diamond yards, did you not?

A. Yes sir.

Q. How soon after that did you see the oil?

A. I didn't see it after that, I didn't pay any more attention.

[fol. 298] Q. Did you see it the day of the accident?

A. Yes sir.

Q. Were you walking along between the rails at that time?

A. Yes sir.

Q. What were you doing there, just looking to see?

A. No.

Q. Where did the oil start in reference to the crossing?

A. I think it was about twenty-five feet west of the crossing.

Q. How far did it extend—down to where the people got hurt?

A. It was right to where the automobile stopped.

Q. How many feet of oil did you see along there by the rail?

A. I don't know how many feet it was.

Q. Could you give us some estimate—was it a hundred feet?

A. Might have been.

Q. Was it a hundred and fifty feet?

A. It was more than fifty—probably seventy-five or a hundred feet.

Q. In other words, it was seventy-five or a hundred feet that there was oil continuously along there?

A. I would not say that; I don't know.

Q. In splotches or how?

A. It looked in splotches to me.

Q. Was the oil on both rails?

A. I did not notice any only on the north rail.

Q. And you noticed places about two or three feet apart between the rails?

A. No, it was right along on it.

[fol. 299] Q. Which way were you walking—were you walking toward the crossing or walking away from it when you noticed this oil?

A. I walked up and down there about fifty times. I did not notice it each time.

Q. Did you see any sand?

A. I don't remember seeing any at all.

Q. You know you use white sand—do you know that?

A. Yes sir.

Q. You say you could see the highway through the orchard—in looking to your right—you have told us that, did you not?

A. Yes sir.

Q. Then I suppose you saw this automobile when you looked up through the orchard, didn't you?

A. Yes sir.

Q. You saw it before you got to the crossing—you saw it coming along the highway up there?

A. I saw it before we hit the car, yes.

Q. How far back was your train from the crossing when you looked up there through the orchard and saw the automobile approaching the crossing?

A. I don't know how far back; I don't remember how far back it was.

Q. Can you give us an estimate of how far from the road you were when you looked up through the orchard and saw the automobile coming?

[fol. 300] A. I don't remember how far it was.

Q. As you went down there, on the foot-board of the tender, you were the foremost member of your crew on that train, were you not?

A. Yes.

Q. About how far were you from the engineer in the locomotive from where you stood?

A. Just the le-gth of the tender; I don't know how far that is.

Q. As you were standing there on the left-hand side going down towards this crossing did you notice a whistling post?

A. No sir, I did not pay any attention to that.

Q. You had seen the whistling post there before many a time?

A. Yes sir.

[fol. 301] **Stanley Ford**, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. Mr. Ford, what is your first name?

A. Stanley.

Q. You live at Fairport?

A. Fairport, yes sir.

Q. Are you a married man?

A. Yes sir.

Q. How long have you lived at Fairport?

A. A little over five years.

Q. What is your business?

A. Fireman.

Q. How long have you been a fireman?

A. Five years and three months.

Q. All of that time for the F. P. & E.?

A. Yes sir.

Q. I don't know whether you had any prior railroad experience or what?

A. Yes sir.

Q. With what company?

A. New York Central.

Q. How long an experience was that?

A. About two years altogether.

[fol. 302] Q. In what capacity?

A. As brakeman.

Q. Now, you were fireman on the engine which was hauling a cut of cars on July 19th, 1929, which had an accident at Hardy crossing, or thereabouts?

A. Yes sir.

Q. What side of the cab does the fireman occupy in forward motion?

A. On the left side.

Q. But in the direction you were going on that day, on which side of the cab were you?

A. That would be on the right side in the direction we were going.

Q. You would be on the north side of the cab?

A. Yes sir.

Q. On what side, or what position in the cab does the engineer occupy, or did he on that day?

A. He would be on the right hand side.

Q. On the left side in the direction in which you were going at that time?

A. Yes sir.

Q. Whose duty is it to sound the whistle on the engine?

A. The engineer.

Q. Whose duty is it to ring the bell?

A. Fireman.

Q. This was not an automatic bell on this particular engine?

[fol. 303] A. No sir.

Q. And what does it require in order to ring the bell?

A. Pulling the rope.

Q. It was your duty, was it, when the crossings were reached, to ring the bell when the whistle was sounded?

A. Yes sir.

Q. You are familiar with the Hardy Road crossing?

A. Yes sir.

Q. As you approached that crossing, what, if any, signals were given—what, if any, crossing signals were given?

A. Yes sir.

Q. I say, what, if any, crossing signals were given?

A. The whistle signal and the bell signal.

Q. When you approached that crossing that day, just before the accident, what, if any, crossing signals were given?

A. The engineer blowed the whistle.

Q. What did he give, the regular crossing signal?

A. Yes sir.

Q. How many times did he give it?

A. Two longs and two shorts.

Q. You count them as one signal?

A. One signal, yes sir.

Q. And did the engineer give more than one crossing signal that day?

A. Yes; he gave two.

[fol. 304] Q. Can you say about where you were—the location of the engine at the time the whistle was sounded, I mean by position now on the track—about where you were?

A. About five hundred feet to the first signal.

Q. Where do you figure that? I am asking you the position—that is your estimate of the distance?

A. Yes; this side of the curve.

Q. After you came around the curve?

A. Past the curve, yes.

Q. And you estimate that distance from the curve at about five hundred feet?

A. Yes sir.

Q. From the crossing down to the curve you estimate about five hundred feet?

A. Yes sir.

Q. If it should turn out wrong in your estimate, the point where you whistled, I take it, would be about the same that you have already told us.

A. Yes sir.

Q. When the engineer blew the whistle, what, if anything, did you do?

A. I rang the bell.

Q. For how long a time did you ring the bell?

A. For about five hundred feet, from the curve to the road.

Q. Did you start when he started?

[fol. 305] A. I could not say I started just at the same time that he started or not.

Q. Would it be substantially the same time?

A. Yes sir.

Q. How far down the line did you continue ringing—did you ring it continuously? I am speaking with reference to the highway crossing. How far did you continue ringing that bell? Did you ring it to the crossing or beyond it, or didn't you ring it clear to the crossing? Don't you understand what I am getting at? How far towards the west did you continue ringing that bell?

A. To the crossing.

Q. What is the fact as to whether or not you were still ringing it when the automobile and tender collided?

A. I cannot remember that. I rang it to the crsosing, I am sure.

Q. On your way down, as you approached the crossing, what is the fact as to whether you saw the automobile approaching?

A. Yes sir.

Q. Where were you located and what were you doing as you approached the crossing?

A. I was standing by the window.

Q. Was your head sticking out of the window?

A. Yes.

Q. Looking ahead?

A. Yes sir.

[fol. 306] Counsel for plaintiff objected to the question and answer.

Q. Where was your head as you approached the crossing, Mr. Ford?

A. Leaning out of the window.

Q. As you approached the crossing at any time did you see the Meredith automobile approaching?

A. Yes sir.

Q. At what rate of speed, in your judgment, was it going?

A. About forty miles an hour in my judgment.

Q. I don't know whether you are able to state exactly where you were at that time—I mean the position that your engine occupied at that time—but will you state it as nearly as you are able to?

A. The engine cab was very near to the crossing.

Q. And where was the automobile as near as you can state at that time?

A. It was coming down the highway and turned off.

Q. What is the fact as to whether or not you have difficulty in judging the distance the automobile was away on account of the speed at which it was going?

A. I don't just understand that question.

Q. Was the rate of speed at which the automobile was going such that it bothered you in estimating just where it was?

Counsel for plaintiff objected to the question.

[fol. 307] A. Well; it was going very fast, I know that.

Q. Did the rate of speed at which that automobile was going make it more or less difficult for you to tell exactly where it was when you first saw it?

A. More difficult.

Q. What did you note the automobile did by way of coming ahead or turning—did it turn?

A. It turned.

Q. Turned in what direction?

A. Cattacornered like that, towards the west.

Q. Towards Fairport?

A. Yes sir.

Q. That would be toward the right, speaking from the automobile's standpoint?

A. Yes sir.

Q. And there was at that time a railroad crossing sign, was there not, something like 29 feet back from the rail to the north?

A. Yes sir; to the north.

Q. Which side of that crossing sign post did this automobile turn between that and the railroad?

A. It would be on this side of the sign, next to the railroad.

Q. In other words, it turned between that railroad crossing sign and the tracks—is the place where it turned to the west?

A. Yes sir.

[fol. 308] Q. Are you able to state more definitely in reference to the exact point where it turned?

A. No; that is all I can say. It cut in this side of the signboard.

Q. Where did it go then?

A. Went into the ditch and up over the ditch and in front of the tank, or the tender.

Q. Went ahead of the tender?

A. Yes sir.

Q. Where was the tender at the time?

A. About forty to fifty feet the other side of the road crossing.

Q. Do you mean the center of the road crossing or the edge of the road crossing or the pavement?

A. The edge of the road crossing.

Q. At the time it was struck the automobile had gone in front of the tender and upon the track?

A. Yes sir.

Q. When you saw this car and realized the speed at which it was going, what did you do?

A. I hollered to the engineer.

Q. What?

A. Told him to stop.

Q. What did he do after that?

A. He used the automatic.

Q. Do you mean the automatic brakes?

A. Yes sir.

[fol. 309] Q. Those brakes were connected with the engine tender, were they not?

A. Yes sir.

Q. The brake shoes on the engine are larger than they are on the cars are they not?

A. Yes sir.

Q. When he applied the brakes, what happened—I mean what effect, if any, did your feel?

A. Gave a little jolt in the cab.

Q. You felt the jolt?

A. Yes sir.

Q. What happened with reference to the rate of speed from that time on?

A. Slowed down.

Q. Until it stopped?

A. Yes sir.

Q. What happened to the automobile in the meantime, after it was struck what happened?

A. Kind of tipped over on its side.

Q. And what further happened to it, if anything?

A. Further down the track it kept settling down until it got flat down.

Q. And how far down the track did it go before it was flat down, would you say?

A. Fourteen or fifteen car lengths, I would say.

Q. It went entirely flat down at the time it stopped?

A. Yes sir.

[fol. 310] Q. Before that it was tilted?

A. Tilted a little bit.

Q. At what angle?

A. About like that, I judge (indicating).

Q. About 45 degrees?

Mr. Anderson: I would say about 30 degrees.

Q. We cannot get the hand in the record very well. Was it tipped half way over, or more or less?

A. It would be something like half way over I judge.

Q. Did it remain in that position until after the train had stopped?

A. Yes.

Q. And then it settled down?

A. Then it settled down.

Q. When this automobile was struck, what, if anything, did you do further, Mr. Ford?

A. After it was struck I got out to see if I could not help stop it.

Q. What did you do?

A. I set the hand brake.

Q. That was a hand brake on the first car east of the engine?

A. Yes sir, east of the engine.

Q. Did you get that set?

A. Yes sir.

Q. Didn't you have time to set any more?

A. No sir.

[fol. 311] Q. Now, on that day, had you been operating that engine all the time that you had been on duty that day?

A. Yes sir.

Q. I mean, you had been fireman?

A. Yes sir.

Q. And it had been in use during the day?

A. Yes sir.

Q. And what is the fact as to whether or not the brakes were effective on that day?

A. The brakes were all right.

Q. Now, when you came to a stop, what, if anything, did the engineer do by way of backing or attempting to back up towards the east?

A. After he got out and looked around he got back into the engine to see if he couldn't back to the east.

Q. To pull the tender off the automobile?

A. Yes sir.

Q. Did he succeed?

A. No sir.

Q. Did he attempt to?

A. Yes sir.

Q. Did you make an attempt too?

A. After he tried to I tried.

Q. Did you succeed?

A. No sir.

Q. Why not?

A. The slack was all bunched up.

[fol. 312] Q. The cars had all come together and you did not have the three or four inches of slack that ordinarily you might have?

A. No sir.

Q. Would it have been possible to have gone further to the west to have gotten a few inches of slack without seriously injuring the occupants of the automobile?

A. We did not want to take the chance of taking the slack.

Q. After that had been done, what did you do next, Mr. Ford?

A. I went up to the crossing and got a machine to take me up to Painesville?

Q. What did you do at Painesville?

A. I went to the New York Central and got a New York Central engine to back down on to us to pull the train off.

Q. I don't know whether anybody went with you to see about ambulances or not.

A. I could not say as to that.

Q. Where did you go at Painesville to get that?

A. Went to the New York Central depot.

Q. What did you do after that?

A. I went down and got a switch engine.

Q. Where was it?

A. It was over on the big curve shoving a train there.

Q. What do you mean by the "big curve"?

[fol. 313] A. The Painesville curve there by the New York Central.

Q. Did you drive the engine down to the place again?

A. Yes sir.

Q. When you got down there what was done by way of pulling the train to the east?

A. We did not couple the engine on until we saw it was all right to couple on, and after that it was all taken care of.

Q. Were the women taken out?

A. Yes sir.

Q. After finding out that that was the fact, what did you do?

A. Then they coupled on and pulled us over the road crossing.

Q. Pulled east over the road crossing?

A. Yes sir.

Q. And later on that afternoon did the engine and cut of cars proceed on to Fairport?

A. Yes sir.

Q. In other words, you pulled over the crossing again and past the scene of the accident and down to near Fairport?

A. Yes sir.

Q. Who were the members of the crew that day—who was your engineer?

A. Mr. Austin.

Q. Gilbert or George Austin?

A. We always called him George.

[fol. 314] Q. He lived over here on Washington Street?

A. Yes sir.

Q. Mr. Austin has died since, has he not?

A. Yes sir.

Q. Some few months ago?

A. A few months ago.

Q. You were the fireman?

A. Yes sir.

Q. And who was the conductor?

A. Mr. Doubledee.

Q. Who were the brakemen?

A. Mr. Fitzgerald and Mr. Conlin.

Q. When you were there at the scene of the accident did you notice the position of the automobile and the tender, in a general way, I mean?

A. I saw the tender was raised up the least bit.

Q. How much?

A. I could not say just how far. I saw it was raised up the least bit.

Q. It was not derailed?

A. No sir.

Q. Were any of the wheels of the tender upon the automobile?

A. I could not say as to that.

Q. At any time while you were there at the scene of the accident that afternoon did you notice the condition of the rails of the railroad track between the Hardy road cross- [fol. 315] ing and the place where the automobile finally came to a stop?

A. Yes sir.

Q. What did you notice?

A. I noticed oil on the rails.

Q. On one or both rails?

A. Both rails I noticed.

Q. Was there any difference as to the distance upon the two rails that you noticed this oil?

A. I could not say if there was any difference or not.

Q. Where did you notice the oil?

A. Right after the machine was hit.

Q. And from that point the oil upon the rails went in which direction?

A. Towards the west.

Q. And for how great distance did you notice oil upon the rails?

A. About 250 feet, I should judge.

Q. After you saw the Meredith automobile in a position of danger—from the time that you gave this call to the engineer until the train had come to a complete stop, was there anything that could have been done by the engineer or yourself to stop that train at any less distance than what was actually done?

Counsel for plaintiff objected to the question. The court overruled the objection. To which ruling of the court counsel for plaintiff at the time excepted.

[fol. 316] Q. Was there anything that could have been done that was not done?

A. No sir.

Counsel for plaintiff moved the court to strike out the answer. The Court overruled the motion. To which ruling of the court counsel for plaintiff at the time excepted.

Cross-examination.

By Mr. Anderson:

Q. Mr. Ford, you testified in the case last week, did you not?

A. Yes sir.

Q. And then at least twice your testimony was taken by deposition—you remember that? Once about a year ago and another time much less than a year ago—do you remember that?

A. Yes sir.

Q. Now, you had been that day at the Diamond plant before you went down to where you got those 32 cars, isn't that right, Mr. Ford?

A. I don't understand the question.

Q. You had taken a train down to the New York Central road before you coupled your engine on to these 32 cars, isn't that true?

A. Yes sir.

Q. Do you remember whether those cars or any of them [fol. 317] were loaded that you took down?

A. I could not say whether they were or not.

Q. Do you know who it was that coupled your engine on to those 32 cars?

A. I could not say for sure, no sir.

Q. Now, your engineer, when the engine is in forward motion, is on the right hand side?

A. Yes; in forward motion.

Q. And you are on the left hand side?

A. Yes sir.

Q. The engine was just reversed at this time, in backward motion?

A. Yes sir.

Q. And so you were on the right hand side and he was on the left hand side?

A. Yes sir.

Q. Explain to the jury please, just where you stand—how far away from you the engineer in his proper position stands or sits?

A. I should judge between six and eight feet between the fireman and engineer. I could not say just how many feet it was.

Q. Well, your cab or that part of the locomotive engine is not more than nine feet wide, is it?

A. I could not say for sure.

Q. You have gotten on it many times, what is your idea?

A. I judge about six to eight feet.

[fol. 318] Q. You know it is nearer ten feet?

A. No sir, I could not say.

Q. Haven't you any idea about it?

A. No sir.

Q. How far would the engineer be from you—about as far as from here to you—say six to eight feet, is that about right?

A. Yes, about six to eight feet.

Q. When you gave him the signal—when you noticed the danger down at this crossing, how did you give the signal—by voice or motion of hand?

A. I hollered to the engineer.

Q. No trouble for him to hear?

A. No sir, he did hear me.

Q. There is not any doubt that he did hear you?

A. No sir.

Q. Now, by the way, do you use a rule book on your road?

A. No sir.

Q. Did you ever have a rule book on your road?

Counsel for defendant objected to the question.

A. They don't use them.

The Court: He says they do not have it on the road.

Q. As you went down toward that crossing, I understood you to say when Mr. Blakely asked you whether you had your head out of the window, you said yes?

A. Yes; I looked out of the window.

[fol. 319] Q. And at that time you were pulling the bell cord?

A. Yes sir.

Q. When the bell works automatically—it works that way doesn't it?

A. Yes sir.

Q. That day you were pulling the cord?

A. Yes sir.

Q. Now, as you went past, going down toward the crossing, was there a whistling post there?

Counsel for defendant objected to the question. The Court sustained the objection. To which ruling of the court counsel for plaintiff at the time excepted.

Mr. Anderson: He said there was a whistling post there.

The Court: It does not make any difference whether there was or not. I have ruled enough on that proposition.

Q. As you went up toward the crossing you told us where the whistle sounded—did you not so testify?

A. We always started right at the end of the curve. That was our mark.

Q. Didn't you testify, Mr. Ford, that you guessed where it should be sounded?

A. I said it was five hundred feet.

Q. That was a guess, wasn't it?

A. It was a guess in my own mind, yes.

[fol. 320] Q. Didn't you say you imagined it was five hundred feet away?

A. I did not say I imagined.

Q. Was there any mark there at all to indicate five hundred feet—yes or no?

A. No.

Q. Did you commence to ring the bell before or after you say the whistle was sounded?

A. I could not say whether I started right at the time or not. I could not say that.

Q. Do you remember whether you commenced first or whether he commenced first?

A. I could not say that—I don't know.

Q. The question was asked you in your deposition, when your deposition was taken, where you commenced to give the signal, do you remember that question—I asked you where you commenced, and you said five hundred feet from the crossing, did you not?

A. Yes.

Q. And the bell and the whistle, at least some of the time, were sounded at the same time were they not?

A. Yes sir.

Q. This is supposed to be a map of the place around the crossing down here. Have you seen put any new ties since that accident, in that stretch?

A. No sir, I have not.

Q. The testimony shows that there are 60 or 70 or more [fol. 321] ties been put in there. Did you see any of those put in?

A. No sir, I did not.

Q. Well, you have seen the work, have you not, that has been done since the trial of the last case in putting ballast in down there?

A. Yes sir.

Q. When were they doing that?

A. Last week, I think—the last end of last week.

Q. That completely covered up all of the track and ties except a short distance each side of the crossing, isn't that true?

A. I could not say for sure, because I go over there at night and I cannot see.

Mr. Blakely: It is conceded new ties were put in down there.

Mr. Anderson: All right then.

Q. There was an ordhard on the side of your locomotive engine as you went down to the crossing?

A. Yes sir.

Q. And that orchard extends down the highway from the crossing, eight hundred or a thousand feet, or about that?

A. I could not say how far.

Q. What do you say—something about that?

A. I could not say, because I don't know.

Q. The limbs of the trees are within 25 or 30 feet of your train, is that so? I hand you here a picture that was [fol. 322] taken two or three days after the accident—do you notice the orchard there?

A. Yes sir.

Q. You notice these posts with the cross arms on?

A. Yes sir.

Q. Do you notice these posts are ten to twelve feet high?

A. Yes sir.

Q. Now, that is the orchard, is it not, that you saw there?

A. Yes sir.

Q. And you went down toward this grade crossing with the apple trees 25 or 30 feet away from that train, and you could not see through the orchard any automobile coming on the road through that orchard?

A. No sir.

Q. The only place that you could see anywhere on that road was when you got down close to the grade crossing, that is true, isn't it?

A. Yes sir.

Q. Now, the signal that you gave—that you say you commenced to give—I mean that was commenced to be given about five hundred feet from the crossing—that was loud, wasn't it?

A. Yes sir.

Q. It was as loud as on any other road, wasn't it?

A. Yes sir.

[fol. 323] Q. The bell that you were pulling the rope and ringing, of course that was for the purpose of giving warning, and that gives a good sound, does it not?

A. Yes sir.

Q. And that was being continuously rung and rung and rung for eighty rods—put it that way—before you got to the crossing?

A. Yes sir.

Q. Now, by the way, I have an exhibit here, of the 32 cars in the way and order in which I am informed by the superintendent—in the order in which they appeared in the train that day. When your deposition was taken first and afterwards taken second, you never said anything about attempting to set or setting any hand brakes, did you?

A. I think my first deposition stated that I set a brake.

Q. You say you did state it in there?

A. I think I did, in my first deposition.

Q. Now you tell us that you went on a car to which the locomotive engine was coupled?

A. Yes sir.

Q. And what did you do after you went on that?

A. I set a brake.

Q. Well, in doing that you have to go over the tank of your engine and get over on that other car to get over to where the brake was?

A. Not necessarily so; you go down the gangway.

[fol. 324] Q. It was a wheel brake?

A. Yes sir.

Q. The wheel was on top of whatever kind of car it was?

A. Yes sir.

Q. What kind of car was it?

A. I think it was a gondola.

Q. Don't you know it was a box car?

A. I cannot say. I think it was a gondola.

Q. Don't you know it was an empty box car?

A. I don't know.

Q. If it were an empty box car the brake was on top, and you would have to climb up a ladder with hand holds, would you not?

A. Yes sir.

Q. And on some of these box cars the hand holds are at the side, and some on the ends?

A. Yes sir.

Q. Do you remember the hand holds that you used, where they were located?

A. I could not say as to that.

Q. If it were a hopper you had to use some hand holds, didn't you?

A. Yes.

Q. By the way, when did you start back, as you have told us now, to set the hand brake?

A. After the machine was struck.

Q. Well, you had given the engineer a signal?

[fol. 325] A. Yes sir.

Q. You had been ringing the bell?

A. Yes sir.

Q. At that time you did not need to ring the bell any further—you had rung it until the engine had got over the crossing?

A. Yes; past the crossing.

Q. Who else was standing beside you at the window—anybody?

A. Yes sir.

Q. Who?

A. Mr. Sullivan.

Q. Was he in the employ of the company at that time?

A. Yes sir.

Q. Is he still in the employ of the company?

A. Yes sir.

Q. Were you present when his deposition was taken?

A. Sir.

Q. Were you present when Mr. Sullivan's deposition was taken?

A. No sir.

Q. Did you come down off of whatever car this brake was on before the train stopped?

A. I think when I got down off from the car the train had already stopped.

Q. About how far from where the train eventually stopped when you got back into the engine?

A. I did not get back into the engine. I got down when [fol. 326] the train stopped and walked around to the back.

Q. How far could you see before you got to the road, that is, the highway—on account of the orchard?

A. Twenty-five or thirty feet.

Q. Well, the automobile, when you first saw it—the very first glimpse you got of it—how close was it to your first rail then? Now, please understand me—when you first saw it, how far was it from your first rail?

A. About forty or fifty feet, I should judge.

Q. Do you remember when your deposition was taken the last time this question was asked you—of course you were sworn before the questions were asked you? "Now, you say you saw the automobile, when you first saw it how close was it to the track when you first saw it?" Do you remember answering "About 25 or 30 feet"—you were then answering under oath.

A. I believe it was 25 or 30 feet.

Q. You want to change it to 25 or 30 feet?

A. Yes sir.

Q. When you first saw it it was moving toward the road—your road, wasn't it?

A. Yes sir.

Q. I want to be certain about this if I can be: It was coming so that you could look right at the front of it, wasn't it?

A. Yes sir.

Q. Isn't that the most difficult position of all, to judge [fol. 327] the speed of an automobile or train—when it is coming right toward you—you recognize that fact, do you not?

A. Yes sir.

Q. When it was there within 25 or 30 feet you say it went in the ditch, didn't it?

A. Yes sir.

Q. How far did it move from the time you first saw it, 25 or 30 feet away, until it went down into the ditch?

A. I could not say that.

Q. Did it move half of that 25 or 30 feet? What is your best judgment that it moved from the time that you first saw it, 25 or 30 feet away, until it commenced to go down into the ditch?

A. I will say 25 or 30 feet.

Q. Then it moved to your tracks before it went down into the ditch?

A. It moved from the signboard in down towards the west.

Q. But it moved 25 or 30 feet from the time when you first saw it, before it left the highway, is that it?

A. Yes sir.

Q. How close to your tracks was it then?

A. I could not say.

Q. Tell us something about it—was it 25 feet or 30?

A. I think I said 25 or 30.

Q. Do you mean to tell this jury that you saw the train [fol. 328] hit the automobile?

A. I stated I saw it, yes sir.

Q. Where was the automobile with reference to the highway when you saw the train strike it?

A. About forty or fifty feet west of the crossing.

Q. Then it had been going for how many feet off the highway when it got to that place?

A. I could not saw as to that,

Q. How did the autmobile get that many feet down the track before the collision—how did it get there?

A. Cornerwise—cut in like that towards the west.

Q. At what angle, please?

A. About like that—cut inside of the signboard towards the ditch and along the tracks.

Q. The automobile ran along the side of the train?

A. That is not what I said, I said it went cornerwise.

Q. Didn't you say you had your head out of the window?

A. Yes sir.

Q. Didn't you have your head out of the window while they were moving?

A. Yes sir.

Q. Tell the jury if the automobile moved in the same direction as the train?

A. I said it moved cornerwise.

Q. Didn't it go in the same direction as the train?

A. No sir, it did not.

Q. You have told us every time your deposition was taken [fol. 329] and you told us in the trial last week, did you not, that you could see the rear end of the automobile as it was being carried down the track on your train—you have told us that, have you not?

A. Yes sir.

Q. You could only see the rear end?

A. Yes sir.

Q. How much of the rear end could you see?

A. About a quarter of it, I should judge.

Q. Could you see all of the rear wheels?

A. I could see the wheel that was towards me.

Q. Could you tell us about how many feet of the rear you could see on your side of the tender?

A. I could not say how many feet.

Q. Well, would you kindly tell the jury how it got in that position on the tender—tell the jury?

A. They went across the road like that (indicating) and into the ditch and over on to the tracks—and then it went up the tracks.

Q. Assuming that this red book is the tender and this green book the automobile—please explain to the jury at just what angle they went down there together.

A. Just like that (indicating).

Q. Now, this is the automobile. What part of the automobile was struck by the tender?

A. The back of the front wheels.

Q. Put that in position for the jury there.

[fol. 330] A. Back of the front wheel.

Q. Get them together, please. What position were they in when the collision took place?

A. Going over cornerwise on the track.

Q. Explain that, please.

A. I was explaining. They came together like that.

Q. Where did the tender strike the automobile—this end or the middle or that end?

A. Back of the front wheel.

Q. Then it struck about the front wheel of the automobile. Explain to the jury how the automobile got up so that you could see the rear of it on your tender.

The Court: The witness did say that it was struck back of the front wheel.

Q. Well, after the tender and the automobile came into collision, did the automobile then go on and creep up in front of the tender?

A. Yes.

Q. Were the wheels touching the ground or the roadbed as it crept up?

A. I could not say whether the wheels were touching the roadbed or not.

Q. You said you were looking out.

A. Yes sir.

Q. Don't you know that the automobile was carried on the tender?

A. Yes sir.

[fol. 331] Redirect examination:

Q. Mr. Ford, was that automobile clear up on the tender, being carried along the tender?

A. No sir; it was not up on the tender.

Q. How was it, being pushed along on the rail?

A. Being shoved along on the rail.

Q. Now, I think you said on direct examination that this bell was not an automatic bell.

A. Not at that time.

Q. Required to be pulled by the fireman?

A. Yes sir.

Q. You have been inquired of by Mr. Anderson as to where you said you commenced ringing the bell in your deposition. I want to ask you whether or not you said in your deposition that you rang it at the curve?

A. At the curve, yes sir.

Q. You estimated that distance as five hundred feet?

A. Yes; I estimate that distance as five hundred feet.

Q. This hand brake that you set—on what end of the car was that?

A. Next to the engine.

Recross-examination:

Q. Now, before the slag was put in as it is now, last week, that track and ties stuck up to some extent above the roadbed?

A. I could not say as to that. You cannot see the ties from the engine.

[fol. 332] Q. Don't you know that all the way from the crossing, before the new ties were put in, clear down to this 657 feet the ties stuck up higher than the roadbed—In other words, it was lower between the ties all the way down there.

A. I could not say as to that. I don't know whether it was or not.

Q. Do you want to tell this jury that the automobile was pushed along the ties—shoved along the ties.

A. Shoved along the track.

Q. What did it slide on?

A. On the rail.

Q. Well the rails are four feet, eight and a half inches, that is the standard gauge, and the automobile was much longer than that—what was on the rail?

A. The automobile.

Q. But what part of the automobile, tell me what part of the automobile was on the rail, the rear part, the rear wheel?

A. Yes sir.

Q. Where were the front wheels?

A. They would be over across on the other side.

Q. Don't you know that the automobile did not touch the ties at all, until it got 657 feet and then was pulled under by a projecting tie?

A. I could not say as to that.

[fol. 333] Mr. Blakely: I would like to offer this photograph in evidence as Defendant's Exhibit "B".

Said photograph was thereupon admitted in evidence and the same is hereto attached, marked "Defendant's Exhibit B" and made a part hereof.

Mr. Blakely: Now I would like to introduce the map marked "Defendant's Exhibit A" in evidence.

Mr. Anderson: No objection.

Said map was thereupon admitted in evidence and the same is hereto attached marked "Defendant's Exhibit A" and made part hereof.

[fol. 334] J. M. Crabbs, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. What is your name, Mr. Crabbs?

A. J. M. Crabbs.

Q. Where do you live?

A. Painesville.

Q. How long have you lived here?

A. Since 1907.

Q. What is your business?

A. Civil engineer.

Q. How long, about?

A. How long have I been a Civil Engineer?

Q. Yes.

A. Since 1907.

Q. Where did you study?

A. Ohio State University.

Q. Do you have a degree from that university?

A. Yes sir, I do.

Q. Mr. Crabbs, at some time shortly after the Meredith accident did you take measurements and make observations in the neighborhood of the Hardy Road and the F. P. & E. Railroad crossing?

A. I did.

Q. I want to ask you, if this blueprint marked "Defend- [fol.335] ant's Exhibit A" is the result of your observations?

A. It is.

Q. The top of this blueprint is what direction?

A. North.

Q. And the bottom of course south?

A. Yes sir.

Q. The easterly part of this map as it stands is what direction as it now is?

A. It is east.

Q. And this is the west, towards Fairport?

A. Yes.

Q. Mr. Crabbs, what is the width of the right of way of the F. P. & E. west of Hardy Road?

A. Fifty feet.

Q. Up to that point and to the east of Hardy Road, what is the width of the right of way?

A. Sixty feet.

Q. What is the public highway width?

A. Sixty feet.

Q. I notice some drawings here of a more or less circular form on this map, over on the northeast corner—not entirely in the corner but north of the railroad right of way. What do those represent?

A. They represent apple trees.

Q. Is that drawn to a scale?

A. It is.

Q. Now, I note up here figures in the center of the high- [fol. 336] way north of the railroad crossing, marked 110. What does that mean?

A. That means that that point is 110 feet north of the north rail of the tracks.

Q. From that point down to the track is 110 feet—the north rail?

A. Yes. It is.

Q. I notice there has been a line extended in a northeasterly direction from that point marked "110"—what is that line?

A. That is the line of vision past the tree.

Q. That is, the line of vision along that line would escape the interference of that apple tree at the time that this observation was made shortly after the accident?

A. Yes.

Q. And that line, I notice, is extended down here ~~to~~ the north line of the railroad track, or the north rail rather, of the railroad, and is marked "34" down there—what does that mean?

A. That means that that line of vision from the point 110 feet north past the tree would strike the north rail of the track 34 feet east of the center line of the pavement.

Q. I notice to the south of this point marked 110 a point marked "90"—what does that represent?

A. That indicates that point is 90 feet north of the north *of the north* rail of the track.

[fol. 337] Q. I notice a line extended from that point to the north rail of the railroad track marked "37" at the point where it strikes the rail. What does that represent?

A. It means that it would strike the track 37 feet east of the center line of the pavement.

Q. I notice still further south from the point marked "90" a point marked "70". Does that represent a point 70 feet north of the north rail of the railroad?

A. It does.

Q. And in the center of the pavement, all of these figures, are they not?

A. Yes.

Q. And I note a line extended from that to the railroad track, to the north rail, marked "43"—what does that indicate?

A. It indicates that the line of vision would strike the north rail 43 feet east of the center line of the pavement.

Q. Then, coming still further south in the center of the pavement I notice a point marked "50". Does that represent fifty feet north of the north rail of the railroad in the center of the pavement?

A. Yes.

Q. I notice a line from that striking the north rail of the railroad and marked "56". What does that 56 represent?

A. That represents the point where the line of vision [fol. 338] to the track, to the north rail of the track, is 56 feet east of the center line of the pavement.

Q. I notice another line marked "40". Is that still further south on the center line of the pavement—does that represent 40 feet north of the north line of the railroad track?

A. Yes sir.

Q. I notice that extended to the north rail of the railroad marked "73"—what does that represent?

A. That represents the point which the line of vision would strike the north rail of the track and 73 feet east of the center line of the pavement.

Q. I notice one marked "30". Does that represent 30 feet north of the north rail?

A. Yes sir.

Q. And I notice a line extended from that and marked "130". What does that represent at the north line of the north rail?

A. That represents the point which the line of vision past the tree would strike the north rail of the track, and is 130 feet east of the center line of the pavement.

Q. And you have put one "22", still further south. Does that represent 22 feet north of the north rail?

A. It does.

Q. And at that point the line of vision goes to the east along the line of the railway as far as can be seen, does it not?

[fol. 339] A. It does.

Q. Now, at the time that you made these measurements and took these observations, was there anything along any one of these lines as shown upon your map, to interfere with your vision or the vision of any person who was approaching along the center or to the right of the center, along that highway?

A. There was not.

Q. And then so it follows that if these lines from their respective markings in the center line of the pavement are followed through to their end it represents the unobstructed line of vision at that time?

A. It does.

Q. Were there any trees along this side of the road, out in the highway, which interfered with any of these lines of vision at that time?

A. There were not.

Q. I think there was a tree back here some 85 feet from the north track—from the north rail; but there was nothing, you say, at that time to interfere with these lines of vision which you have portrayed on this map?

A. No; there was not.

Cross-examination.

By Mr. Marshman:

Q. When did you get the data for this map?

A. Sometime between August 5th and August 12th, 1929.

Q. I see at this corner you have what appears to be a tree [fol. 340] on your map, protruding out beyond the corner. State whether or not the limbs of that tree goes out on to the right of way of the railroad company?

A. It does.

Q. And that is true of the trees extending east of it, is it?

A. Yes, it is.

Q. These lines, if I understand you correctly, are to the center of the road—these figures are from the center of the road?

A. They are.

Q. And it would be nine feet less if you took them to the edge of the road?

A. It would.

Q. That road is 18 feet wide, I think you have told us?

A. Yes.

Q. Are these lines that you have drawn the farthest vision point that you can see up the rail from those points back there?

A. Well, they were the line of vision at that time.

Q. And that is a slight grade—up hill—as you approach the crossing?

A. I could not tell you.

Q. But your recollection is it is slight, isn't it?

A. Well, it is very slight, if there is any.

[fol. 341] Redirect examination:

Q. Counsel have asked if the edge of the pavement would make nine feet in difference from the center. It would if you took the edge—the east edge—of the pavement would it not?

A. The distance along the track would be nine feet less if you measured it from the east edge of the pavement.

Q. But a person who was in the center of the pavement, or who was to the right—on the right hand side going south, the line of vision would be as you have said farther over to the west?

A. Yes.

Q. The further you go to the west the longer the vista would be?

A. Yes sir.

[fol. 342] John Sidley, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. Your name is John Sidley?

A. Yes sir.

Q. You reside in Painesville?

A. In the township.

Q. How long have you resided either in the township or the city of Painesville?

A. About twelve years.

Q. What is your business?

A. Automobile repairing and brake testing.

Q. How long have you been connected with the automobile business from a mechanical standpoint?

A. About 11 or 12 years.

Q. You have operated a garage yourself?

A. Yes sir.

Q. And have been employed in other places?

A. Yes sir.

Q. At the present time where are you employed?

A. Franz Tire Service.

Q. What is your job there?

A. My job is brake work when we have it. When there is not brake work I do everything.

Q. Brake testing and adjusting?

[fol. 343] A. Brake testing and adjusting.

Q. Is that your principal business there?

A. Yes sir.

Q. How long have you so been employed by the Franz Tire Service?

A. Four years last spring.

Q. Did you ever take any course of instruction relating to brakes and brake testing?

A. Yes sir.

Q. Where was that?

A. Firestone Tire and Rubber Company, at Akron.

Q. That is a short course of a few weeks?

A. Yes sir.

Q. When was that taken?

A. That was a year ago this summer.

Q. Now, Mr. Sidley, what is the fact as to whether or not you have during this period of years from time to time tested brakes and ability of a car to stop under the application of brakes?

A. Yes sir.

Q. In your business what is the fact as to whether or not you come into contact with a great many different makes of automobiles?

A. Well, practically all of the standard makes.

Q. Are you acquainted with the Packard automobile?

A. Yes sir.

Q. Have you had some experience with that during the years?

A. Quite a bit.

[fol. 344] Q. Are you acquainted with the kind of brakes which the Packard car, model of 1928, Club Sedan, was equipped with?

A. Yes sir.

Q. Is that braking system which is upon that car—is there any similar braking system upon other cars?

A. Yes sir.

Q. Is that or not a system commonly used on several different makes of automobiles?

A. Yes it is, by probably 80 per cent of the mechanical brakes used—Bendix brakes.

Q. Is that the kind of brakes that were upon this Packard Club Sedan, model of 1928?

A. Yes sir.

Q. What is the Bendix-Cowdery Brake Tester organization?

A. They make all kinds of brake testers and brake equipment for testing brakes.

Q. Do you use that where you are employed?

A. Yes sir.

Q. Is that company recognized in the trade and by garage men and mechanics as being a standard company in that business?

A. I was looking it up last night. It is the largest organization in the world that makes brake testers.

Q. What is the fact as to whether or not they get out a chart showing the respective distances in which certain types of cars can be stopped on dry cement pavement?

[fol. 345] A. Yes sir.

Q. Have you ever studied those charts any?

A. Yes sir.

Q. Have you ever made any tests to determine for your own personal satisfaction the accuracy of those charts?

A. Yes, we have.

Q. Now, I think you have already stated that you personally made tests of the cars of the type of 1928 model Packard?

A. Yes sir.

Q. Now, Mr. Sidley, assume that a Packard Club sedan, model of 1928, with brakes in good condition, weight including the occupants 4430 pounds, is proceeding in the summer time at a rate of speed of ten miles an hour on a dry, level, cement pavement—within what distance could a sedan of that type be stopped after the application of the brakes?

A. It should stop within about five feet.

Q. Take it at twenty miles an hour, the same car under the same circumstances, situation and conditions, excepting a speed of twenty miles an hour?

A. About 20 feet.

Q. Take the same car under the same situation and same circumstances and conditions, except the sedan is traveling at the rate of five miles an hour, within what distance could it be stopped after the brakes were applied?

A. I should say about three feet.

[fol. 346] Q. What would you say in that same respect, in that same car, under the same circumstances and conditions, except proceeding at the rate of two or three miles an hour, within what distance could the car be stopped after the application of the brakes?

A. About one foot.

Q. I intended to include in my question the fact that this was equipped with four wheel brakes.

A. Yes sir.

Q. Those answers that you have given were given upon the four wheel brake apparatus which is upon the 1928 Packard Club Sedan, is that right?

A. Yes.

Cross-examination.

By Mr. Marshman:

Q. Do you have that chart with you?

A. Yes sir.

Q. May I see it please? Is your answer based upon this chart or your own personal experience?

A. Partly on that chart and partly on my experience.

Q. You have got me. How do you figure it out?

A. Why, you follow this curved line around the readings on the brake tester and it amounts to this total.

Q. Is this chart for a level highway?

A. Yes sir, right on the bottom it tells it.

Q. And if I understand you correctly, what you mean by your testimony, is that that is the distance within which an [fol. 347] automobile may be stopped when the brakes are actually applied?

A. Yes sir.

Q. It does not take into consideration the time it takes to apply them.

A. No.

[fol. 348] JAMES DOUBLEDEE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. Your name is James Doubledee?

A. James H., yes sir.

Q. You live at Painesville, Ohio?

A. Yes sir.

Q. And on what street, Mr. Doubledee?

A. 576 North State Street.

Q. Are you a married man with a family?

A. Yes sir.

Q. How long have you lived in Painesville?

A. About forty-five years.

Q. What is your business?

A. Railroad conductor.

Q. How long have you been in the railroad business?

A. Thirty-one years.

Q. How long have you been with the F. P. & E.?

A. About sixteen years.

Q. With what road did you have your previous experience?

A. The B. & O., New York Central and Pennsylvania.

Q. Have you been a conductor ever since you came to the F. P. & E.?

A. Yes sir.

Q. And were you conductor on the day that this accident [fol. 349] occurred in which Mrs. Meredith was injured, said to be the 19th day of July, 1929?

A. I was.

Q. Now, you had gone over from near Fairport up to the New York Central interchange on that day, had you not, in the afternoon?

A. Yes sir.

Q. And you had taken some cars up to the New York Central interchange?

A. Yes sir.

Q. And this accident occurred when you were on the way back towards Fairport?

A. Yes sir.

Q. On the way back you had, I think, thirty-two cars?

A. We did.

Q. With an engine and tender?

A. Yes sir.

Q. The engine and tender were in backward motion?

A. Yes.

Q. And the cars were coupled to the front end of the engine?

A. Yes sir, that is right.

Q. I don't know whether you call them coupled to the pilot or not?

A. They were in front of the engine.

Q. This was a switch engine that was being used, was it not?

A. Yes sir.

Q. I think the only engines that the road has are switch [fol. 350] engines?

A. Switch engines is all.

Q. Did you have a caboose on at the end of the cut of cars?

A. We did not.

Q. Did you have any markers on?

A. No sir.

Q. Markers would mean what?

A. That it was a train.

Q. What is a marker?

A. It indicates the rear of a train.

Q. What is a marker?

A. It may be lamps or flags.

Q. Flags in the daytime and lights in the night-time?

A. Yes sir.

Q. And to constitute a train in railroad understanding and parlance, is it necessary to have markers upon the cars?

A. Yes sir.

Q. On this day you approached the Hardy Road crossing on your way back?

A. Yes sir.

Q. You know where that crossing is located, of course?

A. I do.

Q. Before you came to the crossing what is the fact or not whether you heard any signal sounded by the engineer?

A. Yes sir.

Q. What did you hear?

A. I heard him blow the whistle.

Q. What kind of blowing of the whistle was it?

[fol. 351] A. The road crossing whistle—two long and two short.

Q. Where were you riding at the time?

A. In the rear car.

Q. And there were thirty-two cars, I think, of that cut?

A. Yes.

Q. So you were thirty-two cars back from the engine?

A. Yes sir.

Q. Do you know whether it was sounded any more than the once or not, Mr. Doubledee?

A. I am not sure.

Q. Did you hear any bell ring?

A. I did not.

Q. Are you able to hear the bell back that far on the train, with the noise of the train?

A. There is sometimes it can be heard.

Q. And sometimes not?

A. Yes sir.

Q. You did not hear any on that occasion as far as you were concerned?

A. No sir.

Q. As near as you can tell, Mr. Doubledee, from where you were, about what location was it where the engineer sounded the whistle? I am referring now to where the engine would be.

A. After he rounded the curve on that straight track—just got on that straight track.

Q. After you had rounded the curve?

A. Yes sir.

Q. I think you estimated that distance from the high-[fol. 352] way crossing at how many feet?

A. About six hundred feet.

Q. What was the first that you noticed anything out of the ordinary on that day as you approached that crossing?

A. We got a severe jolt on the rear of the train.

Q. What would that indicate to you as a railroad man?

A. That there was something wrong at the head end of the train—either a derailment or someone under the cars, or some accident of some kind.

Q. Did it indicate that the brakes had been applied or not?

A. Yes, it indicated that the engineer had applied the brakes.

Q. At that time you did not know that any automobile had been struck, if I understand you?

A. No.

Q. What did you do when the train stopped?

A. I got off of the rear car.

Q. Then what did you do?

A. Started on the run for the locomotive.

Q. And in doing so did you come to the crossing finally—the Hardy Road crossing?

A. Yes sir.

Q. And your end of this cut of cars was quite a distance down the line, was it not, towards the east?

A. Yes sir.

Q. When you got to the crossing did you receive some information from anyone?

A. From the brakeman and fireman, yes.

[fol. 353] Q. You were told then the nature of the trouble that had occurred?

A. Yes sir.

Q. What did you do then?

A. I ordered the flagman and the fireman to get an engine and an ambulance, and doctors.

Q. What did you want the engine for?

A. To pull the train to the east off the crossing.

Q. Had the fireman at that time given you any information about any attempt on his part to move the train towards the east?

A. Yes sir.

Q. And you instructed him concerning obtaining an engine from the New York Central railroad, is that right?

A. I did.

Q. And when you had given these instructions what did you do then?

A. Kept on going towards our engine.

Q. Did you walk?

A. I ran.

Q. And when you got down there did you see this automobile there in front of the tender?

A. Yes sir, on the rear of the tender.

Q. Well, in front of the westerly part of the tender as it was running that day?

A. Yes sir.

Q. Were any of the wheels of the tender upon the automobile?

A. No sir.

[fol. 354] Q. I don't know whether you can tell or not, Mr. Doubledee, what part of the tender was holding the automobile down?

A. That back drawhead—coupler.

Q. Did you notice the foot-board of the tender? I don't know whether you did or not.

A. Not until afterwards.

Q. Afterwards did you notice that it had been bent under?

A. Yes, against the wheels.

Q. When you got down there what did you do—what did you start doing?

A. To get those women out.

Q. And in doing that did you chop in some part of the top or body of the automobile?

A. They had to pull the top off.

Q. Did you get inside of the car?

A. I did.

Q. And did you stay there in that car until the women were taken out?

A. I did.

Q. And during the course of taking them out did you do anything by way of releasing them from their predicament?

A. I did.

Q. And just briefly what did you do, Mr. Doubledee?

A. I cut the seat to get the girl out.

Q. All right—now the girl was taken out first?

A. Yes sir.

Q. And then Mrs. Meredith was taken out next?

A. Yes sir.

[fol. 355] Q. At any time did you do anything to stop the bleeding of Mrs. Meredith's leg?

A. I did.

Q. What did you do?

A. I used my handkerchief for a tourniquet.

Q. Did you make a tourniquet out of your handkerchief?

A. Yes sir.

Q. And out of what else?

A. A piece of stick.

Q. And did you twist it up after you had it around her leg?

A. Yes sir.

Q. And where did you place that upon her?

A. Just above the knee.

Q. Now, when she was taken out of the car her leg was severed at that time, was it not—I mean, severed before it was taken out of the car?

A. Yes sir.

Q. And at what point approximately was it severed?

A. Right about here (indicating).

Q. Is that a third of the way from the ankle up to the knee, or a quarter of the way?

A. About right there.

Q. How many inches, would you say, above the ankle?

A. I will say three or four inches above the ankle.

Q. About how long did it take to get these women out of the car, in your judgment?

A. Maybe twenty-five minutes.

Q. They were taken away in ambulances?

[fol. 356] A. Yes sir.

Q. After that was done what was done with the cut of cars?

A. This engine pulled it to the east.

Q. This New York Central engine had come and done that?

A. Yes sir.

Q. And it pulled it to the east how far?

A. That end of it would be just over the crossing.

Q. And then later on in the afternoon was the train taken down towards Fairport?

A. Yes sir.

Q. When that cut of cars was taken east over the highway crossing where were you?

A. I stayed where the automobile was.

Q. And then what did you do afterwards?

A. When the automobile was straightened up I walked towards the crossing—east.

Q. Was the automobile taken off from the tracks?

A. Yes, and set to one side.

Q. And then you walked east towards the crossing?

A. Yes sir.

Q. Where were you going then—for what purpose were you walking east?

A. To see what condition the locomotive was in to proceed with our train.

Q. As you walked along the track what did you notice with respect to the rails?

A. There was some oil on the top of the rail.

[fol. 357] Q. From what point to what point did you notice oil, if you can tell?

A. About four hundred feet east from where the engine stopped.

Q. Was the oil on one rail or on both rails?

A. It was on both rails.

Q. For the same distance on both rails?

A. No, on the north rail there was different places, there was spots where there was no oil.

Q. In going down there did you notice a part of the automobile as you walked along the track?

A. There was a door there.

Q. What door was that?

A. The front door of the automobile.

Q. And what side?

A. The right side.

Q. It was the right-hand front door of this Packard automobile?

A. Yes sir.

Q. And where was that with reference to the tracks?

A. It was about two hundred and fifty or three hundred feet from the crossing.

Q. That is not quite my question. I was asking with reference to the tracks.

A. It was on the railroad tracks.

Q. Between the rails?

A. Between the rails.

Q. And about two hundred and fifty feet west of the crossing?

A. Yes sir.

[fol. 358] Q. Did you see it afterwards?

A. Up alongside of the fence afterwards.

Q. And was it alongside of the fence about opposite to where you saw it?

A. Yes sir.

Q. And what is the fact as to whether or not it remained there until down to a week or two ago?

A. Yes.

Q. And was that placed where it remained until about a week or two ago a short time—a day or two—after the accident?

A. It had been put inside of the fence in the fall.

Q. That was recently done?

A. Yes sir.

Q. And before this time when it was put over into the field, which occurred a week or so ago, had it remained in that same place that you first saw it there alongside of the fence?

A. It did.

Q. You saw it first between the rails of the railroad track?

A. Yes sir.

Q. And the next time you saw it you saw it over there by the fence opposite the place where you had seen it on the railroad?

A. Yes sir.

Q. And it remained there until a short time ago?

A. Yes sir.

[fol. 359] Cross-examination.

By Mr. Anderson:

Q. You have been a conductor on this road for how many years?

A. About sixteen.

Q. And you have had other railroad experience before working for this company—for the Baltimore & Ohio?

A. Yes sir.

Q. What position with the Baltimore & Ohio?

A. Conductor.

Q. And with what other roads other than the Baltimore & Ohio?

A. I worked for the New York Central.

Q. And what others?

A. The Pennsylvania.

Q. Any others?

A. Three railroads besides this F. P. & E.

Q. Then, it is the Pennsylvania, New York Central, Baltimore & Ohio and this road?

A. Yes.

Q. About how many years of railroad experience have you had?

A. Thirty or thirty-one.

Q. Now, on this day, the 19th day of July, two years ago last July, you started with your forty cars, wasn't it, to go down to the New York Central connection?

A. Yes sir, about forty cars.

Q. About how many of those forty cars were loaded—about half?

A. I think so.

Q. And those cars were delivered to the New York Central and while you were there a New York Central engine moved them some place, did it not?

[fol. 360]

A. Yes sir.

Q. You saw that while you were there?

A. Yes sir.

Q. After these cars were moved by the New York Central—after you delivered them to the New York Central, was when the coupling was made to these thirty-two cars?

A. Yes sir.

Q. Of course your company hadn't anything to do with the moving of the thirty-two cars before you coupled on to them?

A. No sir.

Q. Where were the thirty-two cars standing when you coupled on to them?

A. On the storage track on the New York Central railroad.

Q. And all of those were loaded but nine?

A. Yes sir.

Q. And there were twenty or more hopper cars loaded with slack, were there not?

A. Yes.

Q. And you, of course, as conductor knew where they came from—Kentucky and Virginia, and elsewhere?

A. No, I did not know.

Q. You did not know that?

A. No sir.

Q. You coupled your engine on to those thirty-two cars?

A. I did.

Q. Where was your rear brakeman—Conlin, I think [fol. 361] was his name—at that time?

A. On the west side in front of the engine.

Q. And you and Conlin went down to the rear of that train?

A. Yes, sir.

Q. You on one side and Conlin on the other—or do you remember?

A. I coupled the engine on and I am not sure whether Conlin went on the left side down the train or over the top; I am not positive.

Q. The purpose of going to the rear of the train on each side of it was for the purpose of inspection, was it not?

A. I went there to take the numbers—to get a record of each car.

Q. And you were inspecting too to see if the cars were all right?

A. I was looking at the cars for other purposes.

Q. Didn't you tell me in your deposition you went looking to see if there was danger of derailment?

A. Well, if you call that inspection.

Q. Those were all standardized cars that came in over the trunk line, the New York Central?

A. Yes, sir.

Q. And all were equipped under the law with air, were they not, so far as you saw?

A. So far as I know.

Q. And so far as you know on all of these thirty-two cars the air appliances, the hose and angle cocks, and cylinders, were all in good condition?

[fol. 362] A. Yes sir.

Q. The front part of your locomotive engine, where is the air hose located on that?

A. On the front of the engine, on the right side of the pulling bar or drawhead.

Q. And about how many feet of air hose was attached to the locomotive engine at that place?

A. The standard air hose, I can't tell you the length.

Q. About how long—three feet?

A. Somewhere along there—I never measured.

Q. About how large in circumference?

A. An inch and a half or two inches—something like that.

Q. And at the end of the hose there is a metal, is there not—a coupling metal?

A. Yes sir.

Q. Now, on the car to which you coupled the engine—the superintendent furnished me a list of them which shows an empty box car—there was a hose on that, too?

A. Yes.

Q. And it hung down?

A. Yes sir.

Q. Where the hose was hanging down on the box car to which you coupled the locomotive engine, and the hose that hung down from the locomotive engine how far were those hose apart when they were coupled.

A. I don't know how far it was, just a short distance.

Q. What is necessary to couple them?

[fol. 363] A. Just a step in between.

Q. How long would that take—would it take less than half a minute?

A. I don't time myself, but it takes a short time.

Q. You did not do it, did you?

A. No sir.

Q. Why not?

A. It was not necessary.

Q. Why do you say it was not necessary?

A. Because we didn't need that air; it was a yard movement. We did not need the air in our switching movement.

Q. These cars were to be moved to the yards of the Diamond Alkali Company, were they not?

A. Yes sir.

Q. Would there have been any stop made at all until you got to the Diamond Alkali Company down beyond this accident?

A. Yes.

Q. Where?

A. At the safety stop, at the junction.

Q. Where else?

A. No other stop that I know anything about.

Q. If the accident had not happened you would not have taken out any of the cars—any of the thirty-two cars, before you got to the yard of the Diamond Alkali Company?

A. No sir.

Q. How many grade crossings would you have had to have crossed from where you coupled on to these thirty-two cars until they were delivered in the yard of the [fol. 364] Diamond Alkali Company?

A. Three.

Q. And one of them was the U. S. 20, was it not?

Counsel for defendant objected to the question. The Court sustained the objection.

Q. Now, with thirty-two cars without any air, every brake on the thirty-two cars was useless so far as use was concerned, was it not—it could not be set without air?

A. No sir.

Q. You did have air brakes on the locomotive engine?

A. Yes.

Q. And on the tender?

A. Yes.

Q. The brake shoes on the locomotive are bigger than the brake shoes on the thirty-two cars?

A. Yes.

Q. In other words, they are wider and longer on the engine?

A. Yes sir.

Q. Do you know how much larger—could you tell us?

A. I could not tell you anything about that.

Q. Would you agree with me in saying that the brake shoes on the engine are five and a half inches wide and sixteen inches long?

A. Nearly that. I don't know how close that would be, but nearly so.

Q. And three and a half inches wide and fourteen inches long on the cars—in other words, you had how many brake shoes on the locomotive engine?

[fol. 365] A. Six.

Q. How many brake shoes on the tender?

A. Eight.

Q. And then how many brake shoes on each of the thirty-two cars?

A. Eight on every car.

Q. How many brake shoes on each of the thirty-two cars?

A. Eight, I said.

Q. And therefore, of course, you had thirty-two times eight. Now, why do you say it was unnecessary to spend half a minute to couple air on those thirty-two cars before you started to go to the Diamond Alkali?

Counsel for defendant objected to the question.

(No ruling of the Court.)

Q. You think it was not necessary in moving the thirty-two cars to the Diamond yard to have those extra brakes, do you?

A. That is what I thought.

Q With this drag of cars and the locomotive engine without any air at all on the thirty-two cars, within what distance on a level track could the train be stopped on a dry day, a dry track, and dry rails, in an emergency?

Counsel for defendant objected to the question. The Court overruled the objection; to which ruling of the Court counsel for defendant at the time excepted.

A. I don't know just how soon the engineer could stop that train.

Q. Well, you didn't know when you made the coupling, did you, that day?

[fol. 366] A. I didn't know how soon he could stop.

Q. You didn't know how many feet the train would go then in an emergency on that day, did you?

Counsel for defendant objected to the question. The Court overruled the objection; to which ruling of the Court counsel for defendant at the time excepted.

A. I don't know exactly how many feet it would go.

Q Approximately—tell us that?

A. I could not do it—not to make an emergency stop.

Q. You had charge of your train?

A. I had charge of that drag of cars, yes.

Q. Yes, you were foreman of every member of the crew, were you not?

A. I was.

Q. As conductor—as foreman—when you started the movement of that bunch of cars toward the Diamond Alkali yard—say, for instance, there had been a stalled automobile on the crossing, you don't know within what distance the train could have been stopped?

Counsel for defendant objected to the question. The Court sustained the objection.

Q. Or there might be a little child playing between the rails—you would not know within what distance the train could be stopped, could you?

Mr. Blakely: I object and except to that question. The Court has already passed upon this.

Mr. Anderson: There is nothing before the Court.

[fol. 367] Mr. Blakely: We except to that as misconduct on the part of counsel.

Q. The train, so far as ordering it to be stopped or started is concerned rested upon you as conductor, did it not?

A. Do you mean the starting and stopping of that drag of cars was up to me?

Q. Yes, as conductor

A. Yes.

Q. Did you stop at this U. S. 20 crossing?

Counsel for defendant objected to the question. The Court sustained the objection.

Q. Put it this way. You say there were three grade crossings to cross. What was the first crossing you would come to?

A. U. S. 20. We protected that crossing.

Q. And this Hardy Road, was it the first, second or third?

A. Third.

Q. Did you stop at the first crossing you came to?

Counsel for defendant objected to the question. The Court sustained the objection; to which ruling of the Court counsel for plaintiff at the time excepted, and stated that he expected the witness if permitted to answer would say he did not.

Q. Did you stop at the U. S. crossing 20?

Counsel for defendant objected to the question. The Court sustained the objection; to which ruling of the Court counsel for plaintiff at the time excepted, and stated he expected the answer would be "no".

[fol. 368] Q. As you came down to this Hardy Road crossing you were on the rear of your train with your rear brakeman, Conlin, were you not?

A. Yes sir.

Q. And if there had been no accident of course you would not have stopped at the Hardy Road?

A. There would have been no reason for stopping, no.

Q. But it did stop?

A. Yes.

Q. And stopped with a sort of a jerk?

A. Yes sir.

Q. And what, if anything, taking into consideration your many, many years of railroad experience, would that jerk indicate to you, if anything?

A. That the engineer had used the automatic on the engine, or in other words, put the air on.

Q. When the train stopped did you get off the train and go toward the head end?

A. I did.

Q. Did Conlin go with you?

A. Yes.

Q. You two went back on each side of the train—the north and south side?

A. The north side.

Q. When you got down to the grade crossing and you met two of your crew, did you not?

A. Yes sir.

Q. And one of the crew was the fireman, Ford?

A. Yes sir.

[fol. 369] Q. And then did you go with Ford, and the four of you then go down to the front end?

A. No.

Q. Where did Ford go, if you know?

A. Up the road somewhere.

Q. And who was with Ford?

A. I don't know.

Q. One of your crew?

A. One of them.

Q. Did he go up the road somewhere, too, or did he go back with you?

A. None of them went back with me.

Q. Then when you got down to the front end of the train or cut of cars you found an automobile?

A. Yes.

Q. And that was the first — that you had seen that automobile so far as you know?

A. Yes.

Q. In other words, you did not know anythinng about what had happened at the crossing?

A. No.—

Q. The automobile was resting upon or touching at least some parts of the tender?

A. Yes.

Q. The tender, not the locomotive part—the tender—is about how long?

A. I could not even give a guess at it. I never measureed one.

Q. You have seen thousands of them?

A. Yes, but I would not even give a guess on the length [fol. 370] of them.

Q. Do you know whether it was a 100,000 pounds loaded, or not?

A. I don't know.

Q. The rear end of it sloped?

A. Yes sir.

Q. And there was a foot-board on the rear end?

A. Yes sir.

Q. Did the foot-board extend the full width of the tender?

A. Yes. sir

Q. Your rails are four feet, eight and a half inches—standard width—are they not?

A. Supposed to be.

Q. Where was the automobile with reference to the rear end of the tender?

A. Across the track.

Q. Were either of the ladies taken out at that time, or both taken out after you got there?

A. Taken out after I got there.

Q. How long from the time you started to take them out until you succeeded in getting them out?

A. About twenty-five minutes.

Q. Tell the jury if you noticed to what extent Mrs. Meredith's leg was injured?

A. I do not just understand your meaning.

Q. The leg was injured—you noticed that Mrs. Meredith's leg was crushed—you noticed that?

A. Yes.

Q. Describe that to the jury; that is what I want you to do.

[fol. 371] A. It was crushed from the calf of the leg down to about three inches above the ankle.

Q. That was the right or left?

A. I don't know.

Q. It was the leg that was afterwards amputated?

A. Yes.

Q. To what extent did you notice injuries on the leg that was not amputated?

A. I did not see any.

Q. Were they put into ambulances and sent to the hospital, as far as you know?

A. As far as I know, yes sir.

Q. When you were with the New York Central—the Pennsylvania and the Baltimore & Ohio—you had a rule book, did you not, that you spoke of in the other case?

A. Yes sir.

Q. A printed rule book?

A. Yes sir.

Q. Did you have a rule book?

Counsel for defendant objected to the question.

The Court: I think that is already in evidence, but you may ask this witness.

To which ruling of the Court counsel for defendant at the time excepted.

Q. Did you have a rule book?

A. No.

Q. Did you ever have a rule book?

A. Not on this road.

[fol. 372] Q. Now, as you came to the Hardy crossing, before you felt any jar or jolt of your train—before it stopped—you said you heard a whistle?

A. Yes.

Q. Your deposition has been taken twice, has it not, by me?

A. Yes sir.

Q. The first in 1930 and the second in 1931?

A. Some time this year, yes.

Q. Well, you remember the other one, do you not?

A. Yes, some time, yes.

Q. You told us in this recent deposition that was taken in June of this year—do you remember this question on page 46, referring to the locomotive engine, "Where did it whistle, if you know"—and you answered, "About five hundred or six hundred feet before he got to the railroad crossing"—is that correct?

Q. Five or six hundred feet?

Q. Did you so testify under oath when your deposition was taken?

A. Five or six hundred feet, yes.

Q. Five or six hundred feet?

A. Somewhere near that; I said that.

Q. Let me read again, please—"Where did it whistle, if you know"—and you answered, "About five hundred or six hundred feet before he got to the railroad crossing"—and then I said, "About five hundred or six hundred feet"—and you said, "Yes"—you remember that testimony, do you?

A. Yes.

[fol. 373] Q. And was that correct?

A. Yes sir.

Q. Now, by the way, I understood you to say that you found an oil tank from the automobile?

A. An oil tank?

Q. Did you find some part of the automobile there on the road?

A. I found a door.

Q. And where was that with reference to where the automobile was? Was it up toward the grade crossing from where the automobile was?

A. Yes.

Q. Now, you understand me—this that you say was a part of the automobile—where did you find it?

A. Between two hundred and fifty feet and three hundred feet.

Q. Half way down to the automobile?

A. Yes sir.

Q. You signed a typewritten statement—just answer this yes or no—afterward?

A. Yes.

Q. And was that the next day, or the day after the accident?

A. I don't remember.

Q. It was very soon after the accident?

A. Some time after the accident, yes sir.

Q. You remember when you gave your deposition you said the day after the accident—do you remember that?

A. I may have, yes. I said we signed a typewritten statement, yes.

Q. Have you seen that typewritten statement from the [fol. 374] time that you signed it until the present time—have you ever seen it?

A. No.

Q. Has it ever been read to you, and if so, when?

A. Yes, when I signed it.

Q. Well, since then?

A. No.

Q. The accident happened over two years ago, didn't it?

A. Yes sir.

Q. You have been a busy man during that time?

A. Yes.

Q. And you have had a number of interviews or talks with the superintendent?

A. Several, yes.

Q. And you never asked to see that typewritten statement?

A. No sir, I did not.

Q. Was there anything in that typewritten statement about oil?

A. I don't remember whether there was or not.

Q. You say now that you saw some oil on the track after the accident?

A. After that train was moved to the east, yes; after the drag of cars was moved to the east of the crossing.

Q. How near to the grade crossing did you see this oil first—how near to the grade crossing?

A. About two hundred feet.

Q. From there on down how many feet did you see it on the track?

A. From two hundred feet from the crossing to where [fol. 375] the engine stopped and where the automobile was.

Q. And where was it on the track—was it on the rail or both rails, or on the roadbed between the rails, or where?

A. On the top of the rail.

Q. On both rails?

A. Yes.

Q. And for practically the distance that you have told us on both rails?

A. No.

Q. On which one was the more oil?

A. The south rail.

Q. And how many more feet would you say—I know you did not measure it, but you saw it, as you say—how many more feet was on the south rail than the north rail?

A. About four hundred feet of oil on the south rail; the north rail, there was spots on it covered with oil.

Q. You could see it?

A. Yes sir.

Q. Did you walk between the rails when you saw it?

A. On the outside of the ties.

Q. At that time from the grade crossing down to where the automobile was the ties were bare, you could see the ties, could you not?

A. Yes.

Q. In other words, the ties were not covered up at all then, were they?

A. No.

Q. When you walked along there over four hundred feet [fol. 376] and you could see the oil for all of the distance on the south rail and for a lesser distance on the north rail, could you see any sand?

Counsel for defendant objected to the question. The Court overruled the objection; to which ruling of the Court counsel for defendant at the time excepted.

A. I did not look for any.

Q. I did not ask you that question. I asked you if you saw any.

A. I did not see any, no.

Q. Tell us how the sand box is located on the locomotive engine—how the sand is carried from the sand box to the rail—tell me that?

Counsel for defendant objected to the question. The Court overruled the objection; to which ruling of the Court counsel for defendant at the time excepted.

A. Why, it is a dome-like structure on the top of the boiler. It is connected with pipes that lead to the rail.

Q. And the pipes when the sand comes out, it hits the center of the rail, does it not, just in front of it?

A. Yes sir.

Q. Of course you did not hear any bell?

A. No sir.

[fol. 377] STIPULATION AS TO LOCATION OF CURVE

Mr. Nolan: If the Court please, the witness, Mainey, testified that the distance from the center line of the Hardy Road pavement measured east along the rail to the beginning of the curve was eleven hundred and eighty-six and a fraction feet, and that the distance measured from the center line of the pavement of the Hardy Road along the track to the farther point of the curve was two thousand and eighty-two feet.

It is further stipulated between counsel that the curve in the railroad east of the Hardy Road crossing was at the time of the accident at a point somewhat farther east than the present curve is.

Mr. Blakely: If we did not offer that photograph which was marked "Defendant's Exhibit B" we will have another copy made and substituted; we would like to offer it now. (Said Defendant's Exhibit "B" was admitted in evidence and a duplicate copy of same is hereto attached and made part hereof.)

I understand it is agreed where we have used exhibits which have been used in the former case that counsel or parties on each side will within a very short time furnish duplicates for this record so that the record may be complete in each case.

[fol. 378] L. L. DIXON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Blakely:

Q. Your name is L. L. Dixon?

A. Yes sir.

Q. Where do you live?

A. Avery Terrace, Painesville.

Q. How long have you lived in Painesville?

A. About ten years.

Q. What is your business?

A. Manager of the F. P. & E. Railroad.

Q. How long have you been manager of the F. P. & E. Railroad?

A. Several years.

Q. How long have you been connected with the F. P. & E. Railroad?

A. About 11 years.

Q. Mr. Dixon, did you have any previous railroading experience?

A. Practically all my life—working life.

Q. What was that experience before you came to the F. P. & E.?

A. Immediately before I came to the F. P. & E. I was train master of the New York Central railroad in this territory.

Q. What other positions have you held besides train [fol. 379] master of the New York Central?

A. I was assistant road foreman at one time. I was round house foreman; I was instructor in mechanics, on machinery and air brakes.

Q. Is that for the New York Central?

A. For the New York Central.

Q. Have you held any position as examiner at one time?

A. Yes; we had an examining board which I was a member of.

Q. On what road was that?

A. The New York Central—they had an examining board of which I was a member.

Q. Examining board for what purpose?

A. For examining firemen—for firemen and engineers.

Q. Did that commission have to do with the conduct of examinations of applicants for firemen and engineers?

A. Yes sir.

Q. Had you any other railroad positions or connections which I have not referred to wherein you have had experience, speaking in a general way?

A. I think that covers it in a general way.

Q. I think you are a member of the Civil Service Commission of the City of Painesville at the present time?

A. Yes sir.

Q. On the day of the accident to Mrs. Meredith, you were manager of the railroad at that time?

A. Yes sir.

[fol. 380] Q. At that time of what did your railroad consist, physically—I am speaking of tracks and so forth?

A. The equipment that we had approximated three hundred cars and six locomotives. I think at that time the mileage would be around 19 miles of track.

Q. Of what did your tracks consist—your tracks, not your equipment?

A. Well, it was a switching line; yard tracks.

Q. Did you have any main line at that time?

A. Yes sir.

Q. Where were your switching tracks and your yards and where was the main line at that time?

A. The switching yards started from a point east of Painesville known as Maple Brook Lane on our railroad, located about two miles east of Painesville, and covered from that point to you might say Grand River, Fairport. That was all yards.

Q. Where was the main line?

A. The main line started at Maple Brook Lane just about two miles or two miles and a half east of Painesville and running east of Perry for a mile or so.

Q. Since that time extension has been made over towards the east?

A. Yes sir.

Q. And that is main line, am I right?

A. Yes sir.

Q. Now, this place where the accident occurred on Hardy [fol. 381] Road, was that on your main line or in your yards?

A. In the yards.

Q. What is the difference between the operation of cars or trains in the yard and on the main line?

A. On your main line you operate your trains by train order, by schedule—by orders; and in the yard limits it is in railroad parlance, you do not have that to contend with. You operate your trains at slow speeds and be prepared to stop within the range of your vision. I might explain it this way to make it clear to the jury: You have no orders, and you must expect to find a train ahead of you at any time.

Q. Where?

A. On your tracks, in your yard; and on the main track if you are operating under block signals and you are there in between those blocks you will find no other trains in there.

Q. Something has been said about rule books. How did you operate this railroad so far as orders are concerned?

A. By orders and directions and so forth in notices and bulletins to our men. In your standard code book the rules that you might find referred to govern principally the movements where there are main tracks involved; and when it comes to yard operation it says that yard rules will govern. The principal yard rule is to stop within the range of your vision.

[fol. 382] Q. And that is for protection against any other trains?

A. Yes; in other words, it is not required that you do any flagging within yard limits, and you do not have to have orders to move from one point to another, unless there are some special instructions about it for that particular movement.

A. You are familiar with the operation that was being carried on on the 19th of July, 1929, taking this cut of cars from the New York Central Interchange down towards Fairport?

A. Yes sir.

Q. What was that movement, as to being a main line movement or a switching movement?

A. A switching movement.

Q. Is the Hardy Road on the main line or not?

A. No sir, it is within the yard.

Q. You have a connection with the New York Central interchange up here south of the North Ridge Road near to Henry Kohankie's greenhouse?

A. Yes sir.

Q. And you have a connection with the B. & O. down at Fairport?

A. Yes sir.

Q. And you have a connection with the Nickel Plate near Perry?

A. Yes sir.

[fol. 383] Q. That connection with the Nickel Plate is on the main line, is it not?

A. Yes sir.

Q. The other two connections are in what?

A. In the yard limits.

Q. And what charges are you permitted to make by the Interstate Commerce Commission within the yard limits—what is the nature of that charge?

A. A switching charge.

Q. Your engines I think are all switching engines?

A. Yes sir, all of them.

Q. And they were purchased before you had any main line, is that correct?

A. Yes sir.

Q. Describe as briefly as you can the air brake system of the Westinghouse?

A. Do you wish this in detail?

Q. Not too much detail—not more, I mean, than necessary.

A. We have what is known as a compressor, or air pump, on the locomotive, that is operated by steam.

Q. Let me ask you, before you get any further—have you had any experience in the operation of engines?

A. Yes sir.

Q. You have operated engines?

A. Yes sir.

Q. What is the fact as to whether you have ever op-[fol. 384] erated freight and passenger engines?

A. Yes sir.

Q. Go ahead.

A. We have an air compressor known as an air pump on the locomotive; one end is the air end and the other is the steam end.

Q. This pump is operated by steam?

A. It is operated by steam. As the air is compressed in this pump it goes into what is known as the main reservoir on the locomotive. In the railroad language that is the storage reservoir, or storage of air. From the main reservoir there is a pipe leading to the brake valve which is applied by the engineer when the brake is applied. Another pipe leading from the brake valve goes to the train line and runs the full length of the locomotive and also under each car. The apparatus on the tender is substantially the same as what is on each car, consisting of a brake cylinder and a reservoir, known as the auxiliary reservoir, and the triple valve and cylinder has a piston in it that moves out if the brake is applied, and attached to this piston are a series of brake levers which finally connect it with the brake shoes and pull the brake shoes against the wheel.

Q. How are the brake shoes operated—by an increase of pressure or a reduction of pressure from the engine?

A. To set the brake the pressure is reduced from the [fol. 385] train line.

Q. What pressure did you have on the day of the accident say in this main tank?

A. The pressure was 90 pounds.

Q. Is that the ordinary pressure?

A. We are required to carry that.

Q. What is the pressure on the tender?

A. 70 pounds. The basis of the leverage on each car or tender is based upon 70 pounds pressure.

Q. There is a brake hose or an air hose, is there not, on each of the cars?

A. A pipe runs under the car and the connection, if one car is coupled to another, is made by an air hose.

Q. When you couple one car to another what do you have to do?

A. To get down between the cars and couple the two angle cocks; that is, to couple the hose, that is all you do.

Q. That would be the coupling of the hose and the turning of the angle cocks in position to receive the air?

A. Yes; but I don't wish to leave the impression that would put the brake in position for operation.

Q. The air would have to be pumped up from the engine?

A. Yes sir.

Q. Before proceeding—if you cared to have the air on these cars, after you had made the couplings and had turned these angle cocks, two on each car, then you would have [fol. 386] to pump up the air from the engine?

A. You would have to charge the train before it would be in position to operate the brake.

Q. Then, when you wish to take off a car for switching purposes—I don't know what you call it—drop a car?

A. Yes, to kick the car or drop the car.

Q. In dropping a car what process would you have to go through if the air were on?

A. Stop and turn the angle cocks at the point which you wish to shunt that car and bleed that car.

Q. Suppose you set the brakes on that car?

A. Yes.

Q. Then you would have to bleed the air out of that car before you could move it any further?

A. Yes sir.

Q. And you would shunt it into the place for which it was designed, the place of its destination, and then, if you took another car to another place you would have to go through that same process?

A. Yes sir.

Q. Tell the jury whether or not it is regarded as practicable in railroad use to use air on cars in switching operations?

A. Very impractical. You cannot switch cars with the air in them.

Q. And is that the reason that in switching operations it [fol. 387] is not customary for railroads to use air on the cars?

A. Yes sir.

Mr. Anderson: I object to this gentleman attempting to testify to what is customary on roads generally.

The Court: The objection is overruled; he may answer.

Q. Are you familiar with the practice of railroads generally?

A. In a general way, yes sir.

Q. What is a train in railroad parlance, Mr. Dixon?

A. A train is an engine or one or more engines, either with or without cars, carrying flags or markers to indicate it as such.

Q. On the day of the accident were those cars—the locomotive and tender and cars, a train in railroad parlance?

A. No sir.

Q. On the day of the accident, Mr. Dixon, were you at your office?

A. Yes, I was.

Q. Did you receive notice of the accident?

A. Yes sir.

Q. Shortly after the accident?

A. I was there as quickly as I could get there.

Q. Did you receive notice of the accident?

[fol. 388] A. Yes sir.

Q. What did you do by way of getting there?

A. Went to Hardy Road immediately in an automobile.

Q. How long do you think it took you to get there, just an estimate?

A. Perhaps five minutes.

Q. When you arrived at the scene of the accident had the two women been taken out of the car?

A. Miss Lee Anna Meredith. I am not sure whether the ambulance had started. She had been taken out and put in ambulance. Mrs. Owen Meredith was also being carried up there at that time.

Q. So you had no part in taking the women out of the automobile?

A. No sir.

Q. What happened after you got there as far as the train is concerned?

A. They got a New York Central engine and coupled on to the east end of the train and pulled the train back.

Q. How far back?

A. Pulled it back east of Hardy Road crossing.

Q. And afterwards was it taken to Fairport?

A. Later on it was taken to Fairport. We took the automobile off of the track and set it on the side of the railroad, and the train went to Fairport.

Q. When the train was pulled east of the crossing where were you?

A. I was at the automobile at that time.

Q. And after that where did you go?

A. I walked along and looked at the railroad to see what the condition of the track was, and what the prospects were of getting the train out of there.

Q. To see whether you could use the track to get the train out of there?

A. Yes sir.

Q. Did you go up to the train?

A. Did you say did I go up to the train?

Q. Did you walk that far?

A. I am not sure; I don't think I did.

Q. You were walking east, I take it, from the point where the automobile was located?

A. Yes sir.

Q. Did you see anything on the track or tracks of the railroad—the rails?

A. Small parts of the automobile strung along the track.

Q. For what distance?

A. I would estimate from the point that we took the automobile off the track to a point within fifty feet of the pavement.

Q. You mean by the pavement, the Hardy Road?

A. Hardy Road pavement, yes sir.

Q. Did you notice anything upon the rails?

A. On the south rail I saw an abundance of oil.

Q. And from what point to what point, approximately?

[fol. 390] A. From a point about fifty feet west of Hardy Road pavement up to the point where the automobile stopped.

Q. Did you see any oil on the north rail?

A. There was spots of oil between the rails. That is what you would expect to see under those conditions. I did not see any on the north rail. I did not look for any.

Q. You were not looking for oil at that time?

A. I was looking at the track to determine what work would be necessary, if any, to move the train, and the oil on the south rail was so much in evidence that I could not help but notice it.

Q. What was the condition of the ties?

A. There were a number of ties splintered up and ends broken.

Q. From what point to what point were the ties splintered up and the ends broken?

A. This is an estimate. From 30 to 50 feet west of the crossing to the point where the automobile stopped.

Q. And is it a fact or not that all along the way the ties for that distance were splintered and gouged?

A. Yes, they were. I don't know just how many. There were probably fifty to seventy-five ties that we put in afterwards.

Q. What is the fact as to whether or not some of the ties were severely splintered?

A. Yes sir, so that we had to take them out.

[fol. 391] Q. And you did take them out? And when was it after the accident that they were taken out?

A. Yes, either the next day or day afterwards, the repairs were made.

Q. What is the fact with those ties which were left and which are there down to the present time—what is the condition of those ties at the present time which were there at the time of the accident?

A. There are a number of them which are in the track yet with the ends broomed out. What I mean by broomed out is that something had rubbed on the ends of them and splintered the wood.

Q. Does "Splintering" express it or not?

A. I would say "broomed" would express it better than "splinter".

Q. What is the fact as to whether or not that was plainly to be seen until recently when that slag was placed upon the track?

A. Yes sir; you could see them very plainly.

Q. Do you know about how far from the crossing the first ones were that you left in—the first tie that you left in that was so splintered?

A. About thirty feet from the west side of the pavement as I remember.

Q. Mr. Dixon, is there any difference in the speed with which air can be applied to an engine and tender as compared with where it is applied to engine and tender and [fol. 392] cars?

A. It takes considerably longer to get your brakes applied effectively on a long train or on the cars as compared with the locomotive.

Q. This air has to be released and has to filter out through all of these cars to have effect upon them?

A. In setting the brakes, the air for the length of the train line or a large portion of it for the length of the train line must travel to the brake valve from the locomotive to set the brakes.

Q. And are more effective when set on the engine and tender than at any other point?

A. Yes sir.

Q. Mr. Dixon, how long to your personal knowledge, had Mr. Austin, the engineer who was on the engine that day, been connected with the road before the day of the accident?

A. He had been there all the time I had been there with the company.

Q. And you have been connected how long, do you say?

A. About 11 years.

Q. He was there then about nine years to your personal knowledge?

A. Yes sir.

Q. You understand that he had been there before.

A. Yes sir.

Q. And was he during all of that period an engineer?

[fol. 393] A. Yes sir.

Q. Have you ever observed his operation of the engine?

A. Yes sir, numerous times.

Q. What do you say as to whether or not he was a competent engineer?

A. I would say he was a very competent engineer.

Q. I am speaking of the date of the accident.

A. Yes sir.

Cross-examination.

By Mr. Anderson:

Q. We were interrupted just a little while ago by a train whistling. Where was that engine,—on what road?

A. I do not know. I presume it is the New York Central, the nearest line.

Q. We have been speaking of air. The air on those 32 cars that had been brought in from the New York Central—you did not make any examination of those cars at all in reference to the air, did you?

A. Do you speak of me personally?

Q. You did not make any examination before the accident, did you?

A. No.

Q. You did not make an examination as to the air afterwards, did you?

A. Yes, I looked over the locomotive,—looked that over.

Q. What you have been telling the jury is just generally about air?

A. I would like to answer your questions, Mr. Anderson.

[fol. 394] Q. The air is pumped up by the locomotive engine, isn't that true, and a gauge is there to show the amount of air that they have? These gauges are there before the engineer all the time, isn't that true?

A. When he is on the seat box there.

Q. On a train the air pressure is 70 pounds per square inch—isn't that true,—on a freight train?

A. It should be.

A. And the reduction of the air to set the brakes is about two pounds—70 to 68?

A. Might set the triple valve but not the brakes.

Q. If the gauge drops two pounds that will set the brakes?

A. I doubt it very much.

Q. Have you ever operated a locomotive engine?

A. Yes sir.

Q. Numerous times?

A. Yes sir.

Q. I asked you that question in the deposition and you said you had not.

A. That I said I had not? I am surprised.

Q. The air then goes back through what you call the train line, is that right?

A. Yes sir.

Q. And the train line is about what size tube?

A. Inch and a quarter pipe.

Q. And then those tubes are under the floor of the different cars—are hung on the bottom of the different cars?

[fol. 395] A. Yes sir.

Q. And then one car is fastened to the other, as far as the air is concerned by what you call the hose?

A. Yes sir.

Q. These hose are about how long?

A. About three feet long.

Q. And about what is the size of the tube of the hose?

A. They are made so that they are not smaller than the hole in the pipe.

Q. And the end of the hose that is farther from the car has an apparatus that permits that to be coupled?

A. Yes sir.

Q. And on each car of the train the line where the hose fastens on the train line there there is an angle cock is there not?

A. Yes sir.

Q. And the angle cock, if turned at right angles to the train line or the hose prevents all air from passing?

A. Yes sir.

Q. Providing, of course, that it is in good condition.

A. Yes.

Q. And when you want the air to pass you have the angle cock so it is parallel with the train line?

A. Yes sir.

Q. And that was true of course, on all of the cars of the 32?

A. Yes sir.

[fol. 396] Q. To stop the air at any place all you have to do is to turn the angle cock at right angles.

A. Yes sir.

Q. And that only just takes a little movement of the hand, does it not?

A. They are usually locked in position.

Q. These cars came in over the New York Central we are told here. They left 32 coupled there on the track at the New York Central road, you understand that do you not?

A. Yes.

Q. Well, is there any doubt in your mind as a railroader that the angle cocks between the different 32 cars were turned at right angles? Have you any idea or suspicion of that?

A. They are liable to be the other way—the angle cocks.

Q. You don't know anything about that, do you?

A. No sir.

Q. As a matter of fact, when another railroad delivers cars they are delivered just as the other railroad had hauled them?

A. No sir, those cars are switched one or two cars at a time, and on each car the cock would be at right angles?

Q. And those 32 cars were all coupled together down there?

A. The couplings were coupled together.

Q. And whether the air was coupled or not, you don't know?

A. No sir; I could not say as to that.

[fol. 397] Q. All of those cars, according to your testimony, were as follows: You gave me a statement in your deposition. When that deposition was taken, you gave the 32 cars constituting that train in the order in which they were in the train, did you not?

A. Yes, sir.

Q. And that is the statement there that has been introduced in evidence?

A. Yes sir.

Q. The top one was the one nearest to the locomotive engine?

A. I think so, but I could not say definitely—one end or the other.

Q. The conductor has testified that he had the rear brakeman were on the top of a gondola of coal and that is the last one in this list, is it not?

A. Yes, sir.

Q. So, apparently the order of these cars is starting at the top?

A. Yes; that is the head end.

Q. Now, there were cars in the train of 32, loaded cars from Booth, West Virginia, isn't that true?

A. Yes sir.

Q. There were 9 from Booth, West Virginia?

A. 16 from Booth.

Q. Were there loaded cars that came from Douglas, West [fol. 398] Virginia?

A. Yes sir.

Q. From Highland, Pennsylvania.

—. ——.

Q. Please take that and tell the jury how many loaded cars were in those 32 that came from states other than Ohio.

Mr. Blakely: We concede some of them did.

A. Well, there is 23.

Q. Now, so far as you know, all of those cars were brought in by the New York Central from different foreign points, is that true,—as far as you know?

A. As far as I know they came that way, but they might have come off of the B. & O. and switched on to the Central and then delivered there.

Q. Then I take it from what you have told the jury that under those circumstances you did not couple up the air at all and never have.

A. Yes, in any train movement we couple up the air.

Q. How many different grade crossings are there on your road?

Counsel for defendant objected to the question. The Court sustained the objection.

The Court: I have ruled that out repeatedly, and I hope this will be the last time I have to sustain that objection.

To which ruling of the court counsel for plaintiff at the time excepted.

Q. May I ask this question—how many grade crossings [fol. 399] where there were whistling posts?

Counsel for defendant objected to the question. The Court sustained the objection.

Q. Well, there were no whistling posts at these three grade crossings that your 32 cars crossed that day in that movement—that is true, is it not?

A. I can say there are none for two of them—I can say there are no whistling posts for two of them.

Q. It crossed three, didn't it?

Counsel for defendant objected to the question.

The Court: I object to this consumption of time. You have your record. Now, I do not want any more of these questions asked about whistling posts.

To which ruling of the court counsel for plaintiff at the time excepted.

Q. You said certain ties were pulled up or displaced. How were those ties before this accident fastened,—those ties that you say were pulled up?

A. Fastened to the ballast and to the rail.

Q. Spiked in, were they not?

A. Yes.

Q. How many spikes were in each side of the tie—to the tie from the rail?

A. If you would please confine it to one question I could answer it. There are four spikes to the tie.

[fol. 400] Q. How far from the grade crossing was the first displaced tie, from the direction the engine was?

A. Approximately 30 feet.

Q. How many more were there on down toward the engine?

A. That were damaged, do you mean?

Q. How many displaced or torn loose or partially torn loose from the rail?

A. I could not say as to that. We replaced quite a number of them.

Q. Were there seventy such displaced ties?

A. I could not say definitely how many there were, but there were somewhere around that many.

Q. The map shows there was something like seventy new ties put in. Were all the loose ones displaced?

A. I don't know how many were replaced, but as I recall, we put in somewhere around fifty or seventy ties around there. A lot of the ties are still in the railroad where they were.

Q. Since the trial of the daughter's case last week, you have with the exception of about thirty feet on each side of the crossing, you have completely covered up these ties, have you not?

A. Yes; we put stone in on that track.

Q. Have you covered them up?

A. I would say they were pretty closely covered up.

Q. You were down there on the day the jury was down and saw the condition, did you not?

[fol. 401] A. I don't know just the distance from the crossing.

Q. From 40 feet from the crossing down to the place where the automobile was the ties are completely covered up with loose stone?

A. Yes, with stone on the track.

Q. Before the ties were not covered up; and in some places the ballast between the ties was lower than the tie, as it was when the daughter's case was tried, isn't that true?

A. Yes.

Q. Where are those ties that you took out?

A. Some of them I gave to the Salvation Army, and some of them are off the track.

Q. By the way, within what distance, since you have been testifying here as an expert—within what distance could that train be stopped that day with none of the brakes in the 32 cars working, on that same grade and on that same road and on that same day—a dry day.

A. I don't know. I do not think it could be stopped any shorter than it was stopped.

Q. Haven't you told us in your deposition that you did not know at all?

A. I say again I don't know definitely, no.

Q. You haven't any real knowledge of the distance within which it can be stopped then and had not when your deposition was taken?

[fol. 402] Counsel for defendant objected to the question. The court sustained the objection. To which ruling of the court counsel for plaintiff excepted.

Q. Since you speak of the operations of railroads generally you are familiar probably with the operation of the New York Central?

A. In a general way.

Q. Do they have a book of printed rules?

A. Yes sir.

Q. That is true also of the Baltimore & Ohio?

A. I presume they have, I don't know.

Q. And also true of the biggest road in the United States, the Pennsylvania?

A. I think so.

Q. Now, just before the other trial last week, the Saturday before—you had all of the men on the line here, of course under your direction?

A. Yes sir.

Q. You had some men down there at the crossing and had certain work done, the Saturday before the other trial?

A. There were some men in that vicinity.

Q. What were they doing down there—how many men did you have?

A. I don't know definitely—a couple of men.

Q. I show you a photograph that has been introduced in evidence that was taken three or four days after the acci- [fol. 403] dent. You have seen that before?

A. Yes sir.

Q. Now, here, to the left of the tracks as you look into the picture, close to the highway, and on the side of the highway toward where you are looking into the picture do you notice that there is a drop there of some feet?

A. Yes; a little drop there.

Q. How many feet would you say—keeping in mind your testimony on the other trial?

A. In keeping in mind my testimony, I testified the same as I do today—two or three feet.

Q. And that extends toward where the engine and the automobile were after it stopped—in that direction clear as far as the picture shows?

A. Yes sir.

Q. You say you saw certain tracks of the automobile there, that you made an investigation?

A. Yes sir.

Q. There was nothing about those tracks that indicated whether it was one kind of an automobile or another—that is true, isn't it?

A. No sir.

Q. Don't you know that a civil engineer living here in Painesville, by the name of Belden—Theodore Belden—a short time before this accident saw an automobile down in there that had been stopped by a train exactly where these tracks were—do you know that?

[fol. 404] A. No, sir.

Q. Did you make any investigation to find out?

A. I never heard of it until you spoke of it.

Q. Now, these tracks started about how far back from the railroad tracks to go down into the ditch?

A. They were right at the edge of the pavement.

Q. How far?

A. The tracks were very much in evidence immediately after we pulled the train away from that section where the automobile came——

Q. My question is how many feet back did it start. Please answer my question?

A. From where?

Q. From that first rail? How far back from that first rail did they start going down in the ditch?

A. About midway between the north rail and that signal, that sign that is indicated there.

Q. How many feet?

A. Approximately ten or twelve feet; I could not say definitely though.

Q. Ten or twelve feet back from the north rail. That would be the first rail—that would be where those automobile tracks left the road.

A. Yes; I would say.

Q. Now, how far down the track in the direction where the locomotive engine stopped—how far did those tracks go?

A. Somewhere between thirty and fifty feet, I would [fol. 405] estimate from the appearance of the track that the ballast was pulled out.

Q. I am asking how far. Please answer the number of feet.

A. Oh, one track of the automobile, or where the ballast is pulled out, you understand—what appeared to be a track—was down in the neighborhood of fifty feet.

Q. Where did the tracks end—those tracks along down there about fifty feet?

A. That was ehere they ended.

Q. How near to the ties or rails?

A. Right up to the end of the ties.

Redirect examination:

Q. I overlooked asking you about those automobile tracks—those tracks that you have been inquired of about were tracks which left the pavement part way between the railroad crossing and the sign on the west side of the road and north of the tracks, is that right?

A. Yes sir.

Q. And went in what direction?

A. Somewhere around a 45 degree angle from the pavement.

Q. Were those tracks discernable all the way or part of the way only?

A. There was one track that you could see very plainly all the way; the other track you could not follow only after it left the pavement for a distance.

Q. And where with reference to the first tie that was injured did those tracks reach your railroad track?

[fol. 406] A. One track was a little further—probably five or six feet beyond, further down the track, than the first tie that was injured.

Q. I think I omitted to ask you this before in reference to the ties that were injured and splintered and gouged. Were those marks fresh on the day that you made your observation, the day of the accident?

A. Yes sir.

Q. And easily to be discerned?

A. Yes, sir.

Q. Something has been said about stone ballast being put upon the tracks recently and since the trial of the case last week. What kind of an operation are you going through in that respect?

A. We are going to put stone ballast on our railroad, and we started at a point perhaps a quarter of a mile or half a mile east of Hardy Road, and we will continue to Perry.

Q. Is that for the purpose of raising your tracks?

A. For the purpose of putting stone under it, and to do that we must raise the tracks.

Q. Does that have any connection with this lawsuit or any desire to hide anything that was there?

A. I cannot see where it would have any connection with this lawsuit.

Q. Well, did it in your mind, were you making it for the purpose of hiding anything down there?

A. No sir.

[fol. 407] Q. I suppose this F. P. & E. railroad is not so large as the New York Central or B. & O.?

A. No sir.

Q. You have not found it necessary up to the present time to issue a book of rules referring particularly to your own railroad, isn't that true?

A. When you are operating as we do, with yard rules, we cover that situation with bulletins, notices and instruct[illegible]

Recross-examination:

Q. You may state whether or not the filling in of the ditch, which you say was two or three feet deep, became urgent just before the start of the young girl's case last week?

A. We did not fill in the ditch.

Q. Could you tell the jury, please, what urgency since then caused you to put on all of that ballast and completely cover the ties in the last few days?

A. Well, this stone has got to be disposed of and got on the track before we get any freezing weather, and it is quite a large job to raise the track and tamp it and take care of it before the winter period, when you cannot do any work of that character.

Q. The urgency did not require that you could wait a week could it?

A. I could tie up the railroad for a week if necessary.

Q. You know enough to know that the work down there completely covered up the ties so that the jury could not [fol. 408] see the premises?

A. Yes sir, I know now it covered the ties.

Q. It resulted in that, didn't it?

A. Yes sir.

Q. Mr. Dixon, you see this map of ours?

A. Yes sir.

Q. And you see this place here, marked 657 feet?

A. Yes sir.

Q. Indicating the point of the accident.

A. Yes.

Q. You may state whether or not some short time after this accident you had one of your civil engineers measure the distance to the point of the accident—you told us the other day, you remember?

A. Yes.

Redirect examination:

Q. And the point where the automobile was, as measured by your engineer was a distance of some 650 some feet, wasn't it?

A. Yes sir.

Recross-examination:

Q. He made a map of it?

A. Yes sir.

Q. You saw the map?

A. Yes sir.

Q. You have not destroyed the map, have you?

A. No sir.

[fol. 409] Redirect examination:

Q. Mr. Dixon, did you measure the distance from the Meredith cottage to the railroad crossing?

A. Yes sir.

Q. You did that by your speedometer on your automobile?

A. Yes sir.

Q. What was the distance, do you remember?

A. The Meredith cottage was .67.

Q. Of what?

A. Of a mile.

Q. And was the Custin cottage .37 of a mile?

A. Yes sir.

Q. And what was the distance from the highway crossing to the point where this automobile door was found?

A. 310 feet.

Q. That is where it was found by the fence?

A. Yes sir.

Q. That was the time when it was there by the fence?

A. Yes sir.

Recross-examination:

Q. Mr. Dixon, it makes it necessary now, I think to ask you a few questions. You have been very actively engaged in preparing this case for the defendant, have you not?

A. Well, I carried it on with all my other business, yes.

Q. You have seen practically every one of the witnesses that has been called here, have you not, for the railroad company?

A. I have seen all of the witnesses, I think, yes sir.

[fol. 410] Q. In fact, you have been going all around this country around here and interviewing them, haven't you?

A. Only in line with my other work, I have.

Q. Your civil engineer is still alive, isn't he?

A. Yes, sir.

Q. Living in Painesville?

A. Yes sir.

Q. He is not sick now?

A. He was in the hall a while ago.

[fol. 411] Mr. Blakely: We wish to offer certain parts of the Amended Petition in evidence in this case, for the admissions contained therein.

Mr. Anderson: I object to a part of the paper being introduced. I do not object to the whole petition being introduced.

The Court: You may introduce the whole petition and call attention to any special part.

Mr. Blakely: For the sake of the record, your Honor, I would like to introduce just this particular part, if I may.

Mr. Anderson: I object to that.

The court sustained the objection. To which ruling of the court counsel for defendant at the time excepted.

Mr. Blakely: Then we offer the Amended Petition and I would like to call the attention of the jury especially to the following:

"That the reason that said train was not stopped many, many feet of less distance was because there were absolutely no air brakes used nor could same be used because of the failure of the conductor and other members of the crew to turn the angle cock on the front of the nearest car to said locomotive engine and thereby permit the air to go into the train line at such pressure that all of the Two Hundred and Fifty-six brake shoes could have been properly applied to the moving wheels under said cars."

And again:

"That nothing could be done by any member of the crew upon any one of the thirty-two cars that would materially check the movement of said train and all of the brakes on said locomotive engine had been applied at or near to the highway crossing, all of which was proximately produced [fol. 412] by the failure to use and apply said stored air."

Said Amended Petition was admitted in evidence and a true copy of same is hereto attached, marked "Defendant's Exhibit C" and made part hereof.

Thereupon, the defendant rested and the above and foregoing with the exhibits hereto attached, is all the evidence offered or introduced by the defendant in chief.

[fol. 413] Thereupon, to further maintain the issues on her behalf, the plaintiff introduced in rebuttal the following evidence:

Albert Isabel, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Will you give us your full name, sir?
A. Albert Isabel.
Q. Where do you live?
A. 467 East Erie, Painesville.
Q. How long have you lived here?
A. Since 1919.

Q. And what is your business?

A. Contractor.

Q. When did you learn that there had been an accident that injured Mrs. Merewith, at the Hardy Avenue crossing?

A. I heard about it after it happened.

Q. About how long after it happened?

A. Well; half an hour.

Q. Did you go to the scene of the accident?

A. Not at first.

Q. Did you go?

A. Yes.

Q. About what time of the day did you get there?

A. I don't remember now, it was sometime ago.

[fol. 414] Q. Was it daylight or dark?

A. It was daylight, at the time when Hood's wrecking car hitched on to their machine to bring it back into Painesville.

Q. When you say "their machine", do you mean the Meredith machine?

A. Yes sir.

Q. Who accompanied you to the scene of the accident?

A. My wife and children.

Q. What children?

A. Two boys.

Q. How old were they then?

A. Five and seven.

Q. State whether you walked down to where you had learned the injury occurred?

A. State where we started walking?

Q. Yes.

A. We started from the road and walked down to the scene of the accident.

Q. Which way did you go?

A. Kind of northwesterly direction.

Q. About how far down the tracks did you walk?

A. Well, we walked all the way down.

Q. When you say "all the way down", all the way down to where?

A. Down to the scene of the accident.

Q. What is your judgment about how far that was, roughly?

[fol. 415] A. I don't know. Seven hundred feet all the way from the road?

Q. Did your wife and children go with you?

A. Yes, they did.

Q. Describe how you walked down there.

A. After we went on to the railroad tracks, about, I would say, fifty yards down, the children started to walking down the rails, and I took the south rail and my wife took the north rail. I had the youngest boy and she had the older one, and I supported the younger boy on the south rail and my wife the other one on the north rail.

Q. State whether or not there was any oil on those rails as you walked down to the scene of the accident?

A. There was no oil on the tracks.

Q. After you got down there I take it that you looked around a while and then came back?

A. Yes sir.

Q. Did you come back the same way?

A. Came back the same way.

Q. When you came back state whether or not there was any oil on those rails.

A. No sir, we did not see any oil at any time, down there or back.

Q. Did you see any sand on the rails?

Counsel for defendant objected to the question. The court overruled the objection. To which ruling of the court counsel for defendant at the time excepted.

[fol. 416] A. No sir, there was no sand on the rails.

Cross-examination:

By Mr. Nolan:

Q. What time did you go down there?

A. I don't know the exact time; it was the time that Hood's wrecking car hooked on Meredith's car to bring it back to town. It was after supper. It was approximately, I would say, an hour and a half after the accident.

Q. That would be about what time of day?

A. I don't remember the time, it was so, long ago. I would say it was about six o'clock, maybe a few minutes after.

Q. Who was with you, your wife?

A. My wife and two children.

Q. There was no train in the vicinity of Hardy Road crossing when you got there?

A. No sir.

Q. Do you know how many trains had passed over those rails before you saw them?

A. No sir.

Q. Was the material that filled the space between the ties level at the time you were down there?

A. I would say almost level.

Q. What was the space between the rails filled up with at the time of the accident?

A. I did not pay particular attention to that. It was either stone or cinders—one of the two.

Q. You testified the other day in this matter?

[fol. 417] A. Yes.

Q. Did I ask you then what the space between the ties was filled with?

A. Yes.

Q. Did you say that it was filled with crushed stone.

A. I told you, I said stone, I thought.

Q. You did not say anything about cinders in response to that question, did you?

A. No.

Q. And you were basing that, of course, upon your recollection?

A. Yes, at the time.

Q. And you are basing this statement that there was no oil upon your recollection at the time?

A. I could answer that easy enough—there was nothing—there was really no oil on the rails. We surely would not let the children get their feet into that. That is my argument for that.

Q. Do you have some interest in this case?

A. No, I have not.

Q. You are friends of Mr. and Mrs. Meredith?

A. I would not say they are really good friends, no.

Q. You visit at their house?

A. Yes sir.

Q. Do they visit at your house?

A. Yes.

Q. Yet you say they are not good friends of yours?

A. Sure they are good friends of ours.

[fol. 418] **Isabelle Isabel**, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Will you give us your full name, please?
A. Isabelle Isabel.
Q. Where do you live?
A. 467 East Erie Street, Painesville.
Q. How long have you lived here in Painesville?
A. All my life.
Q. You are the wife of the gentleman who just went out?
A. Yes sir.
Q. Mrs. Isabel, you learned, did you not, of the accident to Mrs. Meredith and her daughter at the Hardy Avenue crossing?
A. Yes sir.
Q. Did you go to the scene of the accident at that crossing?
A. Yes sir.
Q. With whom did you go?
A. My husband and two sons.
Q. How old were those boys at the time?
A. About five and seven.
Q. About what time of the day, or about how long after the accident was it until you got there?
A. I don't just remember; it was before dark.
Q. And when you got to the crossing itself, state whether or not you walked down to the scene of the accident?
[fol. 419] A. Yes sir.
Q. And about how far was it down there?
A. In feet?
Q. About.
A. I don't know—about six hundred and fifty feet or so.
Q. Describe to the jury just the manner in which you walked down?
A. My husband had one little boy and walked—the little boys walked the rails, and one walked the south rail and I had the other boy on the north rail.
Q. Did you walk in that way all the way down?
A. Yes sir.

Q. State whether or not there was any oil on those rails as you walked down?

A. No sir.

Q. As you walked back, state whether or not you saw any oil on the rails?

A. We did not walk back the same way—just walked back.

Q. Did you see any oil as you walked back?

A. No sir.

Q. As you walked down in that fashion, state whether or not you saw any sand along the top of the rail?

Counsel for defendant objected to the question. The Court overruled the objection; to which ruling of the Court counsel for defendant at the time excepted.

A. No sir.

Cross-examination.

By Mr. Nolan:

Q. What direction did you walk—which rail did you or [fol. 420] the little boy whose hand you held walk on?

A. North.

Q. Coming back, did the little boy whose hand you were holding, walk on the rail?

A. No.

Q. Where did he walk?

A. Outside of the rail, I think.

Q. Which side?

A. I don't remember.

Q. You don't remember whether he walked the north side of the north rail or the south side?

A. No sir.

Q. Do you know how the little boy whose hand your husband was holding walked as they came back from where the automobile was?

A. I don't remember.

Q. When did you first tell anybody that you had seen no oil on the rails at that time—when did you first tell anybody that?

A. I don't remember just when.

Q. Can you give us any idea?

A. No sir.

Q. Do you remember where you were when you told anybody that for the first time?

A. No sir.

Q. Do you recall whether it was either Mr. Meredith or Mrs. Meredith that you told first about not seeing the oil?

A. I don't remember.

[fol. 421] Q. You don't remember whether it was on an occasion when they were guests at your home that you first told them?

A. They were there when I first talked with them about ~~it. I don't know as I~~ talked to anybody else about it before or not.

Q. Nobody had ever come and asked you any questions about it before that, or what you had seen down there before that?

A. No sir.

Q. When you started to go from the highway pavement west on the track where did you get on the rails?

A. About twenty-five yards or so from the crossing.

Q. Then did the little boy stay on that rail the whole distance to the place where the automobile was?

A. Yes sir.

Q. Your husband started in the same place on the other rail?

A. I think so.

[fol. 422] R. N. Heyer, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Give us your full name, please?

A. R. N. Heyer.

Q. Where do you live?

A. Painesville.

Q. How long have you lived here?

A. About eight years.

Q. What is your business?

A. Newspaper advertising.

Q. Who do you work for?

A. The Painesville Telegraph.

Q. Do you remember the time the Merediths were hurt on the Hardy Avenue crossing?

A. Yes sir.

Q. How soon after that accident did you go down to that crossing?

A. Possibly within an hour.

Q. Why did you go down?

A. The ambulances had gone by the office and after hearing several rumors that there had been a serious accident on the Fairport or Painesville Township Park Road we went down to see what it was all about.

Q. You had in mind covering it for your paper?

A. As it happened late in the afternoon and the editorial [fol. 423] department had left and there was no one there at that particular moment, and several of us jumped in a car and went down there to see just what it all amounted to.

Q. When you got down there, state whether or not the engine and cars were on the track?

A. No sir.

Q. They had moved at that time?

A. Yes sir.

Q. Did you go up to the scene of the accident?

A. Yes sir.

Q. How far up the track was that?

A. Between six hundred and fifty and seven hundred feet.

Q. What position did you walk in relation to the rails—between them or on the outside?

A. Between them.

Q. State whether or not you saw oil on top of those rails as you walked up to the scene of the accident?

A. I do not recall seeing any oil.

Q. Do you think it could have been there and you not see it?

A. I hardly think so—I do not think so.

Q. When you came back did you see any oil on top of those rails?

A. No sir.

Cross-examination.

By Mr. Nolan:

Q. Was your attention attracted in any way to the rails at that time, Mr. Heyer?

A. No sir, not particularly.

[fol. 424] Q. You were looking where the automobile was?

A. Yes, with the exception of watching where I was walking.

Q. And you were walking between the rails?

A. Yes sir.

Q. Was the space between the ties level with the ties or did you walk on the ties?

A. I suppose I stepped on the ties and sometimes on the cinders.

Q. It was cinders between the ties, was it?

A. Yes sir.

Q. All you mean to say is that you do not now remember seeing any oil on either one of the rails as you walked up, is it?

A. I did not see any oil, no sir.

[fol. 425] Ralph Andrus, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshman:

Q. Give us your name, please?

A. Ralph Andrus.

Q. Where do you live, Ralph?

A. Painesville.

Q. How long have you lived here?

A. All my life.

Q. Ralph, do you recall hearing about an accident at the Hardy Avenue crossing when Mrs. Meredith was injured?

A. I did.

Q. Where were you at the time you heard about it?

A. At the time I heard about it I was at the crossing.

Q. How did you come to get there?

A. I was on my way home from work.

Q. Driving an automobile?

A. I was.

Q. Was the train standing across the crossing at that time?

A. The train was on the east side of the crossing.

Q. It had been pulled back from the scene of the accident over on to the east side of the crossing?

A. Yes sir.

Q. What did you see around there at that time?

A. I just walked down the rail to the car.

Q. Down to the car—in which direction did you walk to [fol. 426] get to the car?

A. I guess it would be east.

Q. Towards Fairport or what?

A. Towards Fairport—I mean west, I should say.

Q. Did you see Mr. Dixon down there at that time—this gentleman?

A. Yes sir.

Q. Did you walk down with him or directly behind him at any time?

A. I walked behind him and caught up to him and asked him what it was about, and he said he did not know any more than I did.

Q. Did you go all the way to the automobile?

A. I did.

Q. State whether or not you were looking along the rails for anything?

A. I was looking for sand.

Q. Did you see it?

A. No.

Counsel for defendant moved the Court to exclude the answer. The Court overruled the motion; to which ruling of the Court counsel for defendant at the time excepted.

Q. When you walked along there, state whether or not you saw any oil on those rails?

A. I did not.

Q. And how far down those tracks did you go?

A. I went five or six hundred feet; I don't know exactly. [fol. 427] Q. As you walked down there and were looking for sand, state whether or not you saw any oil at all on either one of those rails?

Counsel for defendant objected to the question. The Court overruled the objection; to which ruling of the Court counsel for defendant at the time excepted.

A. I did not see any on the north rail; that is the only one I walked.

Q. Did you see any on the south rail?

A. I did not look.

Q. You don't remember about that?

A. No.

Q. When you came back, Ralph, state whether or not you saw any oil on either of those rails?

A. I did not.

Q. And your attention I understand was directed to the north rail for oil?

A. Yes.

Cross-examination.

By Mr. Nolan:

Q. You did not look at the south rail at all?

A. No.

Q. So you don't know whether there was oil on it or not?

A. No sir.

Q. When you went from the payment west to where the automobile was, did you walk on the rail?

A. On the top of the rail.

Q. All the way?

[fol. 428] A. Yes sir.

Q. Were there other people around?

A. I could not say how many. There were other people, though.

Q. Where was the automobile at the time you arrived—up the track some distance?

A. Up the track—off the track.

Q. Righted up, was it?

A. I think it was, I am not sure.

Q. When you went back where did you walk?

A. On the little cinder path beside the rail.

Q. On which side?

A. On the north side.

Q. Do you mean that you were watching the rail all the time up and back—watching the north rail?

A. I watched it going down.

Q. What do you mean by going down?

A. Towards the car, going west.

Q. But paid no attention to it going back; is that what you mean?

A. Yes.

Q. You want the jury to understand that you watched the rail all the way from the highway crossing up to where the automobile was?

A. I do.

Q. Do you know where the Merediths live at Painesville-on-the-Lake?

A. I do.

Q. You live at home with your father and mother?

[fol. 429] A. Yes sir.

Q. Where do you live with reference to the Merediths?

A. Next door.

Q. Your families are friends, I suppose?

A. Yes.

[fol. 430] William O. Wolff, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. What is your name, please?

A. William Oscar Wolff.

Q. Where do you live?

A. I live at Township Park.

Q. Are you a married man?

A. Well, I have got a family.

Q. You may state by whom are you employed?

A. Baltimore & Ohio.

Q. How long have you been employed by them?

A. Twenty-eight years.

Q. You may state whether or not a week ago last Saturday you went across the Hardy crossing—did you go along the Hardy Road there?

A. Yes, I travel back and forth there to work.

Q. You may state whether or not at the crossing here—the road crossing—you noticed anyone at that place—any railroad men there at that place—just yes or no?

A. Yes.

Q. What were they doing?

A. They were working around there with shovels.

Cross-examination.

By Mr. Nolan:

Q. Do you know whether they were cutting weeds or not?

A. No, I could not swear what they were doing there. I [fol. 431] do not think they were cutting weeds.

Q. Did you notice whether the weeds on the right of way as far as you could see were cut or not?

A. The weeds was not cut on Hardy Road.

Q. As far as you could see from Hardy Road crossing were the weeds cut?

A. I don't know.

Q. You did not make any observation of that?

A. No sir.

[fol. 432] LEE ANNA MEREDITH, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Miss Meredith, you may state whether or not as you and your mother went down on the day of the accident toward the grade crossing—if you went into the ditch?

A. No sir.

Q. You may state whether or not you were on the highway at the time your machine was struck?

A. Yes sir.

[fol. 433] Mrs. MAYME F. MEREDITH, the plaintiff, being called in rebuttal and having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Mrs. Meredith, as you were driving in the automobile toward the place of the accident, on the day of the accident, did you turn to your right and left or any other way?

A. No sir.

Q. You may state whether or not your machine was on the highway—the macadam, at the time that it was struck?

A. Yes sir.

[fol. 434] Owen T. Meredith, a witness called on behalf of the plaintiff in rebuttal, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Mr. Meredith, I call your attention to an exhibit here—a photograph that was taken within three or four days of the accident, and ask you whether or not you saw that crossing as it is shown there in the photograph?

A. Yes sir.

Q. You may state whether or not you went over that in going to your place of business and returning to your home?

A. Yes sir.

Q. Describe that place to the right—to the right of the highway—describe that just before you got to the railroad track?

A. Do you mean at the time of the accident?

Q. Just before it.

A. There was a deep ditch along there.

Q. How deep was it?

A. Three or four feet.

Cross-examination.

By Mr. Nolan:

Q. Does that show in the photograph?

A. No, it don't seem to.

Q. When was the photograph taken?

A. A few days after the accident.

Q. Is there any ditch three or four feet deep observable [fol. 435] in that photograph?

A. This photograph was taken the other way from the crossing and at such an angle it would not show the ditch anyhow.

Q. Look at it and see. Point out on the photograph where the ditch three or four feet deep was.

A. It was right along the highway here.

Q. How close to the highway?

A. Probably four feet.

Q. By the highway do you refer to the paved portion of the highway?

A. Yes sir.

Q. This ditch was three or four feet deep from the pavement?

A. Yes sir—it dropped down quite a bit.

Q. What was it for?

A. I believe it was a drainage ditch.

[fol. 436] Thereupon, the plaintiff rested in rebuttal, and the above and foregoing with the exhibits hereto attached is all the evidence introduced by either party on the trial of said cause.

Defendant's Motion for Directed Verdict

And thereupon, at the close of all the evidence in the case the defendant moved the Court to direct the jury to return a verdict in favor of the defendant.

On consideration whereof the Court overruled said motion. To which ruling of the Court counsel for defendant at the time excepted.

[fol. 437] Plaintiff's Requests to Charge Before Argument

Thereupon, counsel for plaintiff requested the court to give in charge to the jury before argument the following propositions of law. Each request being asked for separately and severally and not as part of a series:

Plaintiff's Request No. 1

It is your legal duty as jurors to try this case upon the evidence that has been introduced and follow the law as the court has given it to you, and I charge you so to do.

Plaintiff's Request No. 2

If you find that an ordinarily careful person or railroad company would not operate a train of thirty-two cars, some of them loaded, up to and across an improved highway grade crossing without air brakes, then you should find the defendant guilty of negligence.

Plaintiff's Request No. 3

If, by the greater weight of the evidence you find that a signal of the approach of the train to the grade crossing was not given by the sounding of a whistle known as a grade crossing signal, at the time and place provided by the statutory law of Ohio, which is at least within 80 rods of such crossing, and if such failure to obey the statutory laws of Ohio proximately contributed, in the slightest degree, to the causing of the plaintiff's injuries of which she complains, then I charge you that it is your duty to find [fol. 438] that the railroad company was guilty of negligence as a matter of law.

Plaintiff's Request No. 4

If, by the greater weight of the probabilities, you find that the defendant, the railroad company, failed to do that which an ordinarily careful and prudent corporation, under like circumstances and like surroundings would have done, as set out in the petition, then it is your duty to find that the railroad company was guilty of negligence.

Plaintiff's Request No. 5

If you find, by the greater weight of the evidence that the employees of said defendant, the railroad company, failed to obey the statutory law of Ohio in causing the bell upon the locomotive engine to ring at least 80 rods from such crossing until the locomotive engine passed the crossing, and such failure to ring said bell for such distance in the slightest degree proximately contributed to producing the injuries to plaintiff, then I charge you that the railroad company was guilty of negligence as a matter of law.

Plaintiff's Request No. 6

If, by the greater weight of the evidence you find that, after the railroad crew in charge of said train knew of the dangerous position of the plaintiff in said carried automo- [fol. 439] bile, and thereafter failed to exercise ordinary care to do that which ordinarily prudent and careful railroad men would have done under like circumstances, and such lack of ordinary care proximately produced injury to plaintiff, then I charge you that your verdict must be for the plaintiff, for under those circumstances, even if you find contributory negligence in the operation of the automobile at the grade crossing it would not interfere with the returning of such verdict for the plaintiff.

Plaintiff's Request No. 7

If, under the law and the evidence you find in favor of the plaintiff, then it is your duty to determine the amount of money to be awarded to her in the way of damages, and you may take into consideration in determining that amount the following:

First, the pain and suffering she has experienced from the time that she was injured, July 19, 1929, to the present time, all of which pain and suffering of body and mind proximately was produced by reason of the injuries that the evidence shows that she received by reason of the collision between the automobile and the train.

Second, all the pain and suffering, if any you find with reasonable certainty that she will experience in the future as a direct result of said injuries.

Third, whatever inability has been directly, proximately produced by said injuries directly affecting her ability to [fol. 440] care for herself and her ability to move about and attend to the ordinary duties of life, if any.

In arriving at this verdict it is your duty to take into consideration her age, her expectancy of life, and from it all give her whole and fair compensation.

But in no event must your verdict so given exceed one hundred thousand dollars.

Plaintiff's Request No. 8

Nine or more of your number may find for either party. If you find for the plaintiff, then nine or more of your number may determine the amount of damages to be awarded in the way of compensation.

DEFENDANT'S REQUESTS TO CHARGE BEFORE ARGUMENT

And thereupon, counsel for defendant requested the court to give the jury the following requests to charge before argument, each request being asked for separately and severally, and not as a part of a series:

Defendant's Request No. 1

Even though you should find the defendant guilty of negligence in one or more respects, yet should you find by a preponderance of the evidence that the plaintiff herself was guilty of negligence, which in the slightest degree directly contributed to cause the injuries complained of, your verdict should be for the defendant.

[fol. 441]

Defendant's Request No. 2

It was the duty of the plaintiff when approaching the railroad crossing to exercise her senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances, to observe the approach of a train at such time and place as would have made the looking and listening effective, and should you find by a preponderance of the evidence that she failed so to do, then you should find the plaintiff guilty of contributory negligence.

Defendant's Request No. 3

It was the duty of the plaintiff when approaching the railroad crossing to exercise her senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances, to observe the approach of a train at such time and place as would have made the looking and listening effective, and should you find by a preponderance of the evidence that she failed so to do and such failure contributed proximately in the slightest degree to cause the injuries complained of, then she is not entitled to recover and your verdict should be for the defendant.

Defendant's Request No. 4

Should you find by a preponderance of the evidence that the defendant company was guilty of negligence in one or more of the respects mentioned in the petition, and that the [fol. 442] plaintiff as she approached the railroad crossing failed to exercise her senses of sight and hearing as would a person of ordinary prudence under the same or similar circumstances to observe the approach of the locomotive and ears, and that such negligence of the plaintiff and such negligence of the defendant concurred and combined to proximately cause the injury to the plaintiff, then the plaintiff cannot recover and your verdict must be for the defendant.

CHARGE TO JURY BEFORE ARGUMENT

Thereupon, the court charged the jury before argument as follows:

Members of the Jury: At the conclusion of the argument of the counsel in this case it will be the duty of the court to give you what is known as the Charge or instructions to the jury, in which the court will endeavor to point out to you what are the issues on the disputed questions of fact which are to be determined by your verdict and what kind of verdict the law requires at your hands on any given state of facts which you find to exist or not to exist. The charge so given will be entirely oral; there is hardly time to reduce it to writing; but in addition to this general charge which I have mentioned, both sides have asked me, and the law permits them to do this, to give you some instructions as to particular propositions of law which will arise in the [fol. 443] case and which are proper for you to know to govern you in your deliberations after you have ascertained the facts.

These instructions will be read to you, and when you retire to your jury room to deliberate upon your verdict you will take them with you and refer to them of course if necessary; but you are not to regard them because they are reduced to writing and the other charge will be verbal, to be of any greater or any less authority than the verbal charge. The law permits these charges to be given before argument, in advance, on some of the propositions of law in the case.

Without further preface I will read the several charges which have been asked to be given to you before argument.

Plaintiff's Requests

(1) It is your legal duty as jurors to try this case upon the evidence that has been introduced and follow the law as the court has given it to you, and I charge you so to do.

(2) If you find that an ordinarily careful person or railroad company would not operate a train of thirty-two cars, some of them loaded, up to and across an improved highway grade crossing without air brakes, then you should find the defendant guilty of negligence.

(3) If, by the greater weight of the evidence you find that a signal of the approach of the train to the grade crossing was not given by the sounding of a whistle known as a grade crossing signal, at the time and place provided [fol. 444] by the statutory law of Ohio, which is at least within 80 rods of such crossing, and if such failure to obey the statutory laws of Ohio proximately contributed, in the slightest degree, to the causing of the plaintiff's injuries of which she complains, then I charge you that it is your duty to find that the railroad company was guilty of negligence as a matter of law.

(4) If, by the greater weight of the probabilities, you find that the defendant, the railroad company, failed to do that which an ordinarily careful and prudent corporation, under like circumstances and like surroundings would have done, as set out in the petition, then it is your duty to find that the railroad company was guilty of negligence.

(5) If you find, by the greater weight of the evidence that the employees of said defendant, the railroad company, failed to obey the statutory law of Ohio in causing the bell upon the locomotive engine to ring at least 80 rods from said crossing until the locomotive engine passed the crossing, and such failure to ring said bell for such distance in the slightest degree proximately contributed to producing the injuries to plaintiff, then I charge you that the railroad company was guilty of negligence as a matter of law.

(6) If, by the greater weight of the evidence you find that, after the railroad crew in charge of said train knew of the dangerous position of the plaintiff in said carried automobile, and thereafter failed to exercise ordinary care to do that which ordinarily prudent and careful railroad [fol. 445] men would have done under like circumstances, and such lack of ordinary care proximately produced injury to plaintiff, then I charge you that your verdict must be for the plaintiff, for under those circumstances, even if you find contributory negligence in the operation of the automobile

at the grade crossing it would not interfere with the returning of such verdict for the plaintiff.

(7) If, under the law and the evidence you find in favor of the plaintiff, then it is your duty to determine the amount of money to be awarded to her in the way of damages, and you may take into consideration in determining that amount the following:

First, the pain and suffering she has experienced from the time that she was injured, July 19, 1929, to the present time, all of which pain and suffering of body and mind proximately was produced by reason of the injuries that the evidence shows that she received by reason of the collision between the automobile and the train.

Second, all the pain and suffering, if any you find with reasonable certainty that she will experience in the future as a direct result of said injuries.

Third, whatever inability has been directly proximately produced by said injuries directly affecting her ability to care for herself and her a[illegible]ity to move about and attend to the ordinary duties of life, if any.

In arriving at this verdict it is your duty to take into consideration her age, her expectancy of life, and from it [fol. 446] all give her whole and fair compensation.

But in no event must your verdict so given exceed one hundred thousand dollars.

(8) Nine or more of your number may find for either party. If you find for the plaintiff, then nine or more of your number may determine the amount of damages to be awarded in the way of compensation.

Counsel for defendant excepted to the giving of each and every one of said plaintiff's requests in charge to the jury before argument.

At the request of the defendant I will give you these further special charges:

Defendant's Requests

(1) Even though you should find the defendant guilty of negligence in one or more respects, yet should you find by a preponderance of the evidence that the plaintiff

herself was guilty of negligence, which in the slightest degree directly contributed to cause the injuries complained of, your verdict should be for the defendant.

(2) It was the duty of plaintiff when approaching the railroad crossing to exercise her senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances, to observe the approach of a train at such time and place as would have made the looking and listening effective, and should you find by a preponderance of the evidence that she failed so to do, [fol. 447] then you should find the plaintiff guilty of contributory negligence.

(3) It was the duty of the plaintiff when approaching the railroad crossing to exercise her senses of sight and hearing as would a person of ordinary care and prudence under the same or similar circumstances, to observe the approach of a train at such time and place as would have made the looking and listening effective, and should you find by a preponderance of the evidence that she failed so to do and such failure contributed proximately in the slightest degree to cause the injuries complained of, then she is not entitled to recover and your verdict should be for the defendant.

(4) Should you find by a preponderance of the evidence that the defendant company was guilty of negligence in one or more of the respects mentioned in the petition, and that the plaintiff as she approached the railroad crossing failed to exercise her senses of sight and hearing as would a person of ordinary prudence under the same or similar circumstances to observe the approach of the locomotive and cars, and that such negligence of the plaintiff and such negligence of the defendant concurred and combined to proximately cause the injury to the plaintiff, then the plaintiff cannot recover and your verdict must be for the defendant.

Counsel for plaintiff excepted to the giving of each and every one of said defendant's requests in charge to the jury before argument.

[fol. 448] Thereupon, said cause was argued by counsel to the jury, and thereafter the court proceeded to and did charge the jury as follows, to-wit:

[fol. 449]

Charge of the Court

Ladies and Gentlemen of the Jury: It now becomes the duty of the court to point out to you what are the issues or disputed questions of fact which are raised by the pleadings of the parties in this case and to instruct you what kind of verdict the law requires at your hands upon any given state of facts which you find to exist, or upon the absence of facts, necessary for a recovery on behalf of the plaintiff.

The action is brought by Mrs. Mayme F. Meredith, who is denominated in law the plaintiff, agaist the Fairport, Painesville & Eastern Railroad Corpany, known as the defendant in the case.

In the action Mrs. Meredith seeks to recover damages for injuries sustained by her in an accident which she avers was due to the fault and negligence of the employees of the defendant railroad company in charge of one of its trains, for which negligence in the eyes of the law the employer company in this case would be responsible. The law requires the plaintiff to file what is known as a petition in the case, setting forth all grounds upon which she claims the right to recover, and for the defendant to file an answer in which the defendant admits as many of the allegations of the petition as it does not desire to contradict and sets up any additional matter of defense which it desires. If any such new matter is contained in the answer the plain-
[fol. 450] tiff has a right to file a reply denying it, if so, the new matter that is set up in the answer.

These papers which the law permits to be filed in the case are denominated the pleadings, and they are to be taken by the jury to your room when you retire to deliberate upon your verdict, and as the parties are confined in their causes of action and defenses to what is set out in their pleadings, it is sometimes expedient for the jurors to refer to those papers to get a clear statement of the matters and claims contained in those pleadings. But you will remember that these pleadings are not evidence; that is, they are no proof of the statements therein contained, except in so far as one party or the other makes admissions as to his or its conduct. These admissions that a party makes may be considered as evidence in the case.

You will have the pleadings in your jury room, but it is the duty of the court to state as concisely as possible what are the main propositions of fact or denial or admission that are contained in either the amended petition or the answer thereto.

The plaintiff avers that on the 19th day of July, 1929, she was driving her automobile along the public thoroughfare in Lake County known as the Hardy Road, which road runs approximately north and south and crosses the tracks of the defendant company at grade; that on the day in question, as she approched this crossing from the north a train of cars owned by the defendant company in the [fol. 451] dispatch of its business was approaching the crossing from the east; that this train consisted of a locomotive which was running at the head of the train but running backward, contrary to the usual way of progress, with the locomotive and tender thereof preceding the engine; and as this train approached this crossing in the language of the petition, "such approach was not signalled by the sounding of any whistle in the way of giving a timely and proper warning or by the continuous ringing of a bell"; that that train consisted of thirty-two cars, some of which were loaded and some were empty; that the approach of this train to the crossing was obscured by trees growing along the railroad right of way; that at the crossing the ground was practically level; that at this crossing the automobile of the plaintiff was struck by the tender of the defendant's train. The petition then goes on to name who was the crew of the train and says that one James Doubledee was the conductor and in charge thereof and that the engineer was in charge of the engine; that the cars were of standard construction and complied with the Federal laws. The petition goes on to state that notwithstanding the collision at the crossing the plaintiff was unharmed thereby and would have been uninjured had it not been for further acts of negligence which it is averred occurred on behalf of the employees of the defendant company in charge of the train. The petition avers that there were absolutely no air brakes upon this train which could have been used, not [fol. 452] because the brakes were not in existence, but because of their failure to adjust the same so that the cars could be controlled from the locomotive engine such brakes were not available, except those contained on the engine and tender. That is, on the thirty-two cars there were no brakes available and therefore the train could not be stopped until it had proceeded a distance of some seven or eight hundred feet beyond the crossing, and that on account of the inequality in the height of the ties which constituted said road bed, the petition says that six or seven or eight hundred feet west of the crossing the automobile, which had been carried for that distance, was forced under the wheels of the tender, and at that time the plaintiff was seriously and permanently injured, for which she claims damages at your hands in the sum of one hundred thousand dollars.

To this amended petition the defendant has filed an answer in which it admits its corporate existence, and the geographical situation of this crossing; that the cars approached said crossing at the rate of about ten miles per hour and collided on the crossing with the automobile; that the employees named in the petition have been correctly stated; that nothing could be done by any member of the crew upon any one of the cars that would have materially checked its movement, except the application of air upon the locomotive and tender; and admits the collision and that [fol. 453] the plaintiff received some injuries at that time, but avers that they were not of the extent or nature alleged in the petition.

The petition, I should have said—I probably omitted that—avers that after the employees of the defendant railroad company discovered this perilous situation of the plaintiff, that her automobile was being pushed or carried along ahead of the train, that they failed to stop the train to avoid the injury, and that the speed of the train could not be materially decreased on account of the inability to apply air to the brakes on the cars, other than the engine itself.

After these admissions which I have mentioned in the answer, as a further ground of defense, which the law gives the defendant the right to do—that is, to plead in the alternative—the defendant avers that even if it be true that the defendant was negligent in some of the respects named in the petition, that the plaintiff herself was also negligent, and by her own negligence directly contributed to bringing about her own injury.

To this answer a reply is or will be filed denying the charge that the plaintiff is guilty of negligence directly contributing to her own injury.

The fact that the accident occurred and that the plaintiff was injured therein, to some extent at least, has not been disputed at all. Nevertheless, the mere fact, standing alone, that the accident occurred and an injury resulted therefrom [fol. 454] raises no presumption in law, and must not raise any presumption in the mind of the jury and would not be permitted to raise any presumption in the minds of the jury, if no evidence was admitted, that anyone was negligent or guilty of carelessness bringing about the injury. On the contrary, the law resumes, in the absence of evidence, that the parties are careful; that is, that they exercise ordinary care to avoid injuring others or to sustain injuries to themselves, and where recovery of damages is sought by reason of the lack of ordinary care, and the case started on the presumption that neither party was negligent, before either party can recover a verdict at your hands or recover a verdict in any similar case, two things must be shown to the jury by a preponderance or greater weight of all the evidence in the case. And first, not only did the accident occur, but was the accident directly caused by the negligence of the defendant, or for which it was directly responsible in some one of the respects, at least, set out in the petition; that the defendant or its agents or servants omitted some duty that it owed to the plaintiff at the time. And that, in itself, is not enough. Further, secondly, it must be also shown by a preponderance of the evidence that such negligence was the proximate or immediate cause of the injuries complained of.

In the special charges which have been given you and which are quite full indeed, you will find expressions [fol. 455] throughout almost all those charges that you may not understand, such as what constitutes negligence and as to what constitutes proximate cause. In these charges you will also note when you come to examine them carefully, as no doubt you will, that they are not all alike as to the instructions to the jury as to their duty. You will find that several of those charges point out to you that certain things if you find them to exist or not to exist, constitute negligence or contributory negligence. Some of the charges, speaking of your finding, say if you find certain facts to exist you will return a verdict for the plaintiff or for the def-ndant as the case may be. So, I want to impress upon you that those charges carefully distinguish between that state of the evidence which simply constitutes negligence but does not determine the matter of proximate cause; and some of them distinctly say to you that if you find certain states of fact to exist that they proximately caused the injury and then your verdict must be of a certain kind. So you will bear in mind that negligence and proximate cause must exist. There are some other expressions that have been used in these special charges and the court will have occasion to use them in the course of the general charge, which perhaps I ought to define to you a little more in detail. I presume that the jury understand the meaning of some of the words that you will find so frequently contained in these special charges and on which special stress is laid; [fol. 456] but I will explain somewhat briefly, so that there will be no uncertainty in your minds as to the precise legal meanings that are expressed in those terms.

The case started with the presumption that there was no negligence on the part of anybody. In a serious accident where the blame cannot definitely be located, where there is no evidence fixing the blame upon anybody—in such case there can be no recovery.

The plaintiff has the burden of proving as it is called in this case the substantial and material averments of her petition by a preponderance, or greater weight, of all the evidence in the case. That expression "greater weight" originated from the figure of the scales, in which we test the weight of commodities or objects and determine in which direction the scale inclines, and is an apt expression to denote the process by which the jury acts in weighing the evidence in a case. In civil actions the jury deals with probabilities as to the truth of the evidence, at least to a large extent. In a criminal case, if you have ever had occasion to attend a criminal trial you know the guilt of the accused must be proved beyond a reasonable doubt. But such is not the rule in civil actions; the party who has the burden of proof is only required to produce a preponderance of the evidence or greater weight of the evidence in favor of the material facts upon which his claim is based. This preponderance may be slight in your mind—you may think that the probabilities in favor of the plaintiff's claim [fol. 457] are not very great; but still, if the greater probability or the greater weight of the evidence inclines in favor of the plaintiff in any degree, that will be sufficient. The law says there must be some preponderance; it does not say how preponderance—in the minds of the jury. If the evidence seems to be evenly balanced in your minds upon a proposition upon which the plaintiff's cause depends—if there is as much evidence upon one side or the other—then the plaintiff fails, because the law aptly says that the plaintiff has the burden. And, of course, if the evidence inclines in favor of the defendant the plaintiff fails.

Neither is the preponderance of the evidence determined by the number of witnesses who are produced upon one side or the other in a case, but rather by the degree of weight or probability that the jury gives to the testimony of the witnesses—the weight of which is entirely in your hands. In determining the credibility of the testimony of the witnesses, you will give it weight in whatever direction it is in your minds entitled to; not necessarily supposing that everything that the plaintiff's witnesses say is to be taken in her favor, or the contrary as to the defendant's witnesses. It is not a mere matter of counting the heads on each side, but which story has the greater probability of truth.

Negligence in law is another name for carelessness or lack of ordinary care, and ordinary care, an expression [fol. 458] which is used in these special charges is a very hard definition for you to remember in this case. It is that degree of care which an ordinarily prudent person placed under the same or similar circumstances would exercise under all the circumstances of the case to avoid doing injury to another or to preserve his or her own safety. It consists neither in heedlessness or recklessness or disregard the ordinary safeguards used to promote the safety of others, neither does it consist in that excessive timidity or caution which anticipates consequences which while possible are very improbable. In short, it is neither the conduct of an extremely timid person or a reckless one, but just that standard of care which an ordinarily prudent person would exercise under the same or similar circumstances. So intricate are the transactions which attend us during our busy lives, during the rush of events, that the law very seldom attempts to define what shall be considered as ordinary care. It leaves that to the good judgment and impartial consideration of the jury; and in so doing, you are not bound to lay aside your experience of the ordinary affairs of life, or how people usually act, or as to matters which are within the common knowledge of everyone, as denoting care or the absence of care. You have a right to apply your own experience.

The violation of a statute or a rule of conduct adopted by the United States government or the legislature of Ohio, is, however, negligence in itself. That proposition is not [fol. 459] referred to the judgment of a jury. The violation of such a statute is negligence of itself; and if such violation results proximately or immediately in injury to another, liability attaches to the party who violated the law. That is, if the two things concur—negligence which the law says exists in such case—and proximate result—a defendant corporation as you have already been told, is liable for the consequences of the negligence, if any, of its agents in charge of the train. The plaintiff, Mrs. Meredith, on her part, must bear the consequences and be liable even to the extent of defeating her claim, if she is guilty of contributory negligence which directly contributed to bring about her own injury.

In this case, as I have already told you, the defendant has a right to set up this defense of contributory negligence. The law in Ohio is this, that if an injury occurs and a party is injured and seeks to recover for the injury, if, notwithstanding the party who inflicted the injury was guilty of negligence even directly bringing about the injury, if the plaintiff herself, the injured party, was guilty of any degree of negligence which directly in the slighest degree contributed to and brought about the injury, then the law denies her any right to recover. While this may possibly seem to you to be a harsh or unjust rule it is the undoubted and conceded law of the State of Ohio, which neither the [fol. 460] jury nor the court have the right to disregard, both of us having taken an oath to discharge our duties according to the law; so that if contributory negligence, as it is called, by the plaintiff, directly and even in a slight degree or the slighest degree contributed to bringing about her injury, it would deprive her of her right to recover. If negligence occur in any degree whatever the plaintiff is left without remedy. There is no presumption, however, as against the plaintiff, at the outset of the case, that she is guilty of any negligence. The presumption is, as I have already stated to you to the contrary. Neither is the plaintiff required to prove as a part of her case in chief that she is free from negligence. The law presumes that until the contrary appears. Should you reach this stage of the case, of course it is possible. I am not pointing out to you how the evidence may strike you in this case—if the plaintiff's entire evidence suggests to you that she is guilty of contributory negligence, contributing to her own injury, the burden is not upon her to overcome that idea in your minds; she would be required to counterbalance it, not overcome it up to removing that impression from your minds. If you do not get the impression from her own evidence that she is guilty of contributory negligence, then the burden of proof upon this issue and upon this issue alone, would be upon the defendant. That is, if the case reaches a stage [fol. 461] where you think that the defendant has been guilty of negligence directly contributing to bring about this injury your verdict should be for the plaintiff unless the plaintiff by her own evidence has led you to believe that the plaintiff has also contributed by her negligence to these injuries.

Direct negligence which proximately or immediately results in an accident, or in other words is the proximate cause of the accident, has been defined by the highest courts in this state to be that which in a natural and continued sequence, unbroken by any new cause, tends to produce the event and without which the event would not have happened.

You will see in the history of a transaction—an accident or an injury—there may be causes which are necessary to be detailed to you as explanatory of the situation, and in which at some stage of the case the conduct of one party or the other may have been remotely related to the actual transaction which you have under consideration; but it is the direct result which the law requires. Negligence which is only remote and did not contribute directly to bring about the accident is not to be considered by you as affecting either party. The negligence which you are to take into consideration is that which directly and proximately caused the injury.

I believe I have covered the definition of these expressions which are used in the general charge and the special charges, and it will not be necessary to repeat [fol. 462] them.

The petition sets out separately stated and numbered grounds upon which the plaintiff is claiming compensation; but they may be resolved into two: first, the failure to give signals in approaching this crossing; second, the failure to exercise ordinary care after the plaintiff's danger was discovered to avoid injuring her.

Taking these up in their logical order, we will first consider the allegation in regard to the failure to give signals. The law of the state of Ohio provides that where a moving train—a moving locomotive—is approaching a railroad highway grade crossing, where the view is in any way obscured by the presence of trees or other obstructions, that the party in charge of the train or the engine shall at a point not less than 80 nor more than 100 rods from the crossing sound the whistle upon the locomotive and ring the bell upon the locomotive continuously until the crossing is passed.

A violation of this rule which has been adopted by the legislature of Ohio would in the eyes of the law be regarded as negligence in itself and the defendant company would be responsible for any accident which directly resulted from the omission of giving such signals.

You will find by an inspection of the petition in this case that the complaint that is made as to the omission of the whistle signal, or as to the whistle signal or its absence being responsible for this accident, that the petition represents [fol. 463] that the approach to said highway was not signalled by the sounding of a whistle in the way of giving a timely and proper warning.

The petition does not definitely state that there was no whistle sounded at all in the vicinity at the time of this accident. It does state definitely that the bell was not continuously rung.

Now, as I have stated to you, the omission of these signals would in itself be negligence; but it must also, as I have been at some pains to impress upon you, be remembered that if the omission to give such signals or omission to give them at the proper place was not the proximate cause of the injury, without which the injury would not have occurred had the plaintiff been in the exercise of due care, for the failure to give these signals did not excuse Mrs. Meredith, the plaintiff in this case, from exercising ordinary care in approaching this crossing, the existence of which she admits she was aware of. If Mrs. Meredith, in approaching [illegible]s crossing knew or by the exercise of ordinary care might have known of the near approach of the train, and notwithstanding that, was guilty of a lack of ordinary care in attempting to pass over the crossing, then, if such negligence directly caused her injury, then she would have been guilty of contributory negligence; and furthermore, in such case, the omission of the signals or part of them would not have been the cause of the accident.

[fol. 464] If the whistle was blown—in that connection I would say to you, the law does not require a railroad company to designate any place for whistling by what is known as a "whistling post". The engineer or party in charge of the engine may blow the whistle at any time or place between the limits of 80 and 100 rods. If the whistle was blown at some other place or even if the bell was not continuously rung, if sufficient warning was given, either by the blowing of the whistle or the ringing of the bell, so that by the exercise of ordinary care the approach of the train could have been discovered or the approach of the train was visible and might have been discovered by the exercise of ordinary care, the plaintiff could not recover on those grounds.

If I am approaching a railroad crossing and I see a railroad train approaching me and I hear it whistle and I hear the bell rung so that I am aware of the approach of the train, the giving of those signals would not release me from the duty of exercising ordinary care and I could not rush or hurry forward and expose myself to danger and excuse myself by saying that I knew or ought to have known the train was coming but they did not sound the whistle or ring the bell within the proper distance.

If you find, however, that there was negligence as to giving those signals—that the whistle was not blown within the proper limits, nor the bell rung, and such negligence on [fol. 465] the part of the railroad company directly and as an immediate and proximate result produced the injury of which the plaintiff complains, and you further find that such injury was not in any way contributed to by the negligence of the plaintiff, then it would not be necessary for you to go any further in this case, except to assess the matter of damages. In such case the first ground of the plaintiff's claim would be established.

You have already been told, however, that if you find that there is negligence of both parties directly contributing to the bringing about of plaintiff's injury, then your verdict would be for the defendant.

If you find that it was no omission of signals or that the omission of signals, if that existed, was not the proximate cause of the plaintiff's injury, then you would not be justified in finding in her favor as to what I might call the "Signal" branch of the case; but you would still have to consider the other ground of negligence set out in the petition—that is, the alleged failure of the defendant company through its agents, after they discovered the perilous position of Mrs. Meredith, to use ordinary care to prevent her injury.

There are certain stages of the case where, as to some of the questions involved it becomes the duty of the court, however reluctantly, under the law, to say to you what construction the law places upon the facts, without leaving that question to the jury. Some question has been raised as to [fol. 466] whether or not the cars in question were a train engaged in interstate commerce under the laws of the United States. That, in the judgment of the court is a legal proposition which the court and not the jury must determine, and the court must assume the full responsibility for such finding. The court therefore instructs you that the engine and thirty-two cars which the defendant was operating at this time, were in the eyes of the law a train and engaged in interstate commerce, and therefore subject to the law of the United States in that particular. The laws of the United States require a train so proceeding and having the legal status that this train had, to have at least 85 per cent of the cars on such train equipped with air brakes, so that by the use of air as applied through those brakes, in addition to the air brake on the engine, the train can be controlled by the engineer. It became, therefore, the duty of the defendant company in this case in starting this train of cars out to provide that the air brakes on at least 85 per cent of those cars should be in working order so that they could be controlled from the engine, and in addition to the air brake on the engine and tender itself; and the failure of the railroad company to so provide the equipment in the manner that it should be used to control, check or stop the progress of the train, would in the eyes of the law be negligence; and for the direct and for the direct and proximate consequence of such negligence the [fol. 467] defendant company would be liable—the burden of proof being upon the plaintiff to show by a preponderance of the evidence that such omission was the direct and proximate cause of the injury to the plaintiff in this case. In considering whether such omission in this case was the direct cause, you may consider from the evidence in this case what length of time after the plaintiff's perilous position was made known to the crew of the train the train could have been stopped if the air brakes had been in condition to be used and had been used. If the plaintiff was originally at fault and there was no negligence on the part of the railroad company as to giving the signals and after the position of the plaintiff was discovered, even the application of the air brakes on the train—if the train had been equipped for that purpose—if that had been ineffectual to stop the train and have avoided the injury, then, of course, the failure to equip with air brakes would not be the proximate cause of the injury. It would have happened anyhow, brakes or no brakes.

In determining whether the failure to have the cars of the train under control of the engineer and as to whether the proximate and immediate result was the injury, you may take into consideration the circumstances concerning the operation of the train. The pleadings set out that without the air brakes being in use upon the cars the speed of the train could not be materially reduced. You may determine, I should say, from the evidence in the case whether by the exercise of ordinary care the train could have [fol. 468] been checked sufficiently, even if not brought to a stand-still, to have avoided the injury to the plaintiff. You may take into consideration also, if it affects your judgment as to the direct cause of the plaintiff's injury, the allegation or the claim that is made that the track was to a considerable extent covered with oil. The jury need not be told that the presence of oil, especially in large quantities, upon the rail, would make it much more difficult to control or stop the movement of the train. That is a matter within common knowledge. It is not necessary

The rule as to contributory negligence—or what is called "last chance" in the case—The law is humane enough to say that although the plaintiff may originally have been at fault, yet, if such negligence had ceased and become a remote and not a proximate cause of the injury, and then, thereafter, the defendant, as you have been told, discovering the situation, must use ordinary care to avoid injury to the plaintiff, although the negligence of the plaintiff herself might have been the remote cause of the situation.

If the preponderance of the evidence leads you to believe that the defendant, through its agents and employees, was guilty of negligence in either of the respects mentioned in the petition, and as a direct and proximate result the injury to the plaintiff occurred and was not contributed to directly by any negligence on her part, the verdict should be for the plaintiff; otherwise, should your finding be lacking [fol. 469] in any of the particulars which I have just enumerated, then your verdict will be for the defendant.

If you find by a preponderance of the evidence the existence of any of these grounds of negligence and it is the proximate result—or that the plaintiff directly contributed to her own injury by her own negligence, you will find a verdict generally for the defendant.

If you find for the plaintiff you will have nothing left to do but to assess to her, as it is called in law, the damages, which should be a fair and reasonable compensation for such injuries as she has sustained as by a preponderance of the evidence she has shown to be the direct and natural consequence of the injury, if you find that the injury was caused by the negligence of the defendant under the rules already given you. You have been instructed quite fully in the special charges as to the elements which you will take into consideration in awarding damages, if such damages should be awarded, and you will confine yourselves to the grounds set out in the special charges. The plaintiff cannot recover in this action for any hospital bills or any medical services or attention; that will have to be sought in another action, if it is sought, to recover them; but you will take into consideration the matters named in the special charge and award her, if you find in her favor, what would be a fair and reasonable money compensation for the injuries that have been so detailed, but nothing for the purpose of punishing the defendant [fol. 470] company for any neglect of duty on the part of its servants or employees. It is compensatory only. You are not forbidden to feel sympathy for the plaintiff in this case. No one would do that; but such sympathy must not affect you in any way, either in returning a verdict in her favor that the evidence has not justified, or in awarding her an amount of damages which you think she is not entitled to under the proof in this case. She is not allowed to give you from any witness any estimate in dollars and cents of what the award should be if you find in her favor, that being left to the discretion of the jury controlled only by the evidence in the case in determining all these propositions, and they are quite numerous, as to negligence, contributory negligence, lack of ordinary care or the award of damages should it be found that the plaintiff is entitled to them.

The jury are the sole judges of the weight of the evidence and the degree of credibility to be given to the witnesses, and as to the facts and the inferences to be drawn from the facts in all matters, except where the court has specifically assumed the responsibility of saying what the facts mean as considered in law. I have done that in a few instances in this case, because the law required that. Outside of what I have distinctly told you of how the law treats the facts, as to any disputed question in this case or any conflict between the witnesses or where there might be different inferences drawn from the testimony of the witnesses and the surrounding circumstances, that is en- [fol. 471] tirely for the jury to determine, and outside of where I have distinctly assumed the responsibility for the facts you are not to understand that I am expressing any opinion or hint to try to guide or influence you as to your determination of any single issue of fact in the case. I have mentioned what you should do if you find a certain state of facts to exist. That is not a suggestion that the court has any idea of the existence or non-existence of such facts. It would be as improper for me to attempt to influence your judgment on a question of fact submitted to you as it would be for you to refuse to follow the law as I have given it to you. I am simply the mouthpiece of the law in this case and give you the law as I understand it, and the jury must accept it as given by me; but the determination of any disputed question of fact is entirely within your province. As officers of the court you perform a very important duty.

In determining the weight to be given to the testimony of any witness, you have the right or duty to consider the demeanor of the witnesses on the stand or the manner of giving their testimony, the interest they have, direct or indirect, in the result of the case, their relationship to the parties—whether they seem to be fair and candid or whether they seem inclined to color their testimony; the accuracy of their recollection; how the testimony of one witness may be corroborated or contradicted by another. In short, anything that in your judgment assists you in [fol. 472] giving greater or less weight to the testimony of the witnesses. That matter is entirely in your hands.

You have already been instructed as to how many will be required to sign the verdict to make it a valid verdict. You will be furnished with two forms, in one of which, if you find for the plaintiff you will simply insert the amount of damages that you allow her. If the verdict should be for the defendant you will simply say by your verdict that you find for the defendant.

The case has been a somewhat tedious one, and I am not censuring any of the counsel or parties connected with the case, because it has some features that are rather unusual and it has been necessary to go into a good deal of detail.

I believe that your opinion when you reach your jury room will be guided by no desire to do anything but justice between the parties. You may find radical differences of opinion existing at the outset when you reach your jury room. Indeed, it is seldom in a case like this that twelve minds will be found thinking exactly alike.

When you retire to deliberate, and that word "Deliberate" means what it says—and the verdict of the jury represents, as the Supreme Court has said rather the consensus of opinion of a number of minds—nine it may be or twelve—engaged in an endeavor to reach a common basis rather than a representation that nine or ten or eleven or twelve people think exactly alike on every phase [fol. 473] of the case. Should these differences arise in your judgment it will be your duty to deliberate by a calm, patient and good-natured conference together. It is very seldom that a jury is not able to come to some conclusion which will determine the rights of the parties, but you should proceed with the utmost impartiality, without regard to who the parties are, as to who is plaintiff or who is defendant, and return a verdict accordingly, and in so doing you will have discharged the obligation which you took at the outset of the case.

I am glad the jury has had the patience to remain here and hear the charge. It will probably promote your comfort to the extent that you will have the rest of the afternoon for vacation. I wish to say to you that while you are absent from the jury box you should be especially careful not to have communication about this case; do not talk about it outside of the jury room even among yourselves, or with any members of your families or anyone else. Do not talk to anybody about the case. You cannot be too careful about it in the interval between now and Monday, because even a little inadvertence on your part might result in undoing all of your work. So do not let this subject be mentioned by you or in your presence until Monday, and return here on Monday morning and begin your deliberations.

The above and foregoing Charge of the Court is all the charge of the court to the jury on the trial of said cause.

[fol. 474] DEFENDANT'S EXCEPTIONS TO CHARGE

Thereupon, counsel for defendant excepted to the General Charge of the court in the following respects, to-wit:

(1) To the language of the court in words or substance as follows—"and as alleged in the petition no warning was given".

(2) To what the court said about the petition "averring that nothing could be done except to apply the brakes, and omitting to state that the petition averred that the brakes on the engine and tender were applied.

(3) To the fact that the court omitted any reference to the general denial of the defendant in its answer.

(4) To what the court said about reconcilement of special requests.

(5) To what the court said about the jury dealing with probabilities.

(6) To what the court said about—that the preponderance may be slight only and if the evidence of plaintiff predominated slightly she had gained the weight of the evidence, and making no mention of the fact that on any part of the case where the burden might be upon the defendant.

(7) To what the court said about the claim of contributory negligence.

(8) To what the court said about "which story had the greater probability of correctness and truth".

(9) To what the court said about the law not defining [fols. 475 & 476] ordinary care but leaves it to the jury.

(10) To what the court said about the failure to give signals and the failure to use ordinary care instead of "alleged" failure so to do.

(11) To the statement of the court that the defendant company was responsible for any accident if it failed to give the signal as required by law.

(12) To the fact that the court discussed the matter as if it were conceded that no signals were given.

(13) To what the court said about "train" and the violation of the laws of the United States.

(14) To what the court said about the failure of the railroad to provide equipment and furnish air as being a violation of the law and therefore negligence.

(15) To what the court said about the last clear chance.

(16) The defendant excepts generally to the Charge of the Court as given.

Thereupon, the jury retired for deliberation and thereafter returned a verdict in favor of the plaintiff and against the defendant as appears of record herein.

And thereafter, within the time provided by law, the defendant filed its motion for a new trial of said case for the following reasons:

Motion for new trial omitted, printed side page 34a, ante.

[fols. 477-479] In support of said motion the defendant filed herein and submitted to the court the following affidavits; which adffiavits are in words and figures following, to-wit:

Affidavit of George E. Mather omitted, printed side page 37a, ante.

[fols. 480 & 481] Affidavit of Elbert F. Blakely omitted, printed side page 40a, ante.

[fol. 482] Said motion for a new trial was argued by counsel upon briefs and submitted to the court; on consideration whereof the court on the — day of February, 1932, overruled said motion; to which ruling of the court counsel for defendant duly excepted.

Whereupon, the court rendered judgment on said verdict in favor of the plaintiff and against the defendant as appears of record herein, to which action of the court the defendant duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS

Whereupon, said defendant on the 19th day of February, 1932, and within forty days after the overruling of said motion for a new trial, filed in the office of the Clerk of said court, this, its Bill of Exceptions taken on the trial of said cause; and Said Clerk forthwith and on the — of February notified Anderson & Lamb, attorneys for the plaintiff, of the filing of said bill, and thereafter, on the — day of February, 1932, being not less than ten nor more than fifteen days after the expiration of forty days from the overruling of said motion for a new trial the Clerk of said court transmitted to the trial judge said Bill of Exceptions, which was received by said trial judge on the 22d day of February, 1932, and the said defendant prays that the same may be found to be correct, allowed, signed and ordered to be made part of the record in said cause, but not spread at length upon the Journal; which is accordingly done this 22d day of February, 1932, being not more than five days after the receipt of said Bill of Exceptions by the trial judge.

Walter D. Jones, Trial Judge.

[fol. 483] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 484] IN COMMON PLEAS COURT OF LAKE COUNTY, OHIO

[Title omitted]

DOCKET AND JOURNAL ENTRIES

1930, Apr. 19. Petition and Præcipe, filed.

1930, Apr. 19. Summons issued with copy of Petition. (Lake Co.)

1930, Apr. 23. Summons returned endorsed:

Serv. & Ret.	.75
Mileage	.48
Total	1.23

Received this Writ April 19, 1930, at 11 o'clock A. M. And on April 22, 1930, I served the within named Fairport, Painesville & Eastern R. R. Co. by serving L. L. Dixon, Manager, by personally handing to each of them a true and certified copy thereof with all the endorsements thereon. James Moloney, Sheriff, by Arthur S. Rand, Deputy.

1930, May 14. Motion to make petition more definite & certain, filed.

1930, May 14. Brief on motion to make Petition more definite & certain, filed.

1930, May 14. Motion to strike from Petition, filed.

1930, May 14. Brief on motion to strike from Petition, filed.

1930, May 21. Amended Petition, filed.

1930, June 28. J. E. filed: Defendant given leave to move or plead on or before July 5th, 1930. Jr. 36, Pg. 124.

1930. July 5. Answer to Amended Petition, filed.

1930, Nov. 10. Motion of plaintiff to continue filed.

1930, Nov. 10. J. E. filed: motion to continue granted. Jr. 36, Pg. 499.

1931, Oct. 13. Jury impaneled and sworn. Continued to Oct. 14, 1931. Jr. 38, Pg. 284.

1931, Oct. 14. Trial to jury. Continued to Oct. 15, 1931. Jr. 38, Pg. 293.

1931, Oct. 14. Motion filed for directed Verdict.

1931, Oct. 15. Trial to jury. Continued to Oct. 16, 1931. Jr. 38, Pg. 299.

1931, Oct. 16. Trial to jury. Continued to Oct. 17, 1931. Jr. 38, Pg. 301.

1931, Oct. 16. Motion filed for directed Verdict.

1931, Oct. 17. Trial to jury. Continued to Oct. 19, 1931. Jr. 38, Pg. 303.

1931, Oct. 19. Verdict, filed.

1931, Oct. 19. Verdict for Plaintiff for $20,000.00/100. Jr. 38, Pg. 306.

1931, Oct. 20. Motion for New Trial filed.

1931, Oct. 21. Reply filed.

1931, Nov. 21. Affidavit of George E. Mather, filed.

1931, Nov. 21. Affidavit of Elbert F. Blakely, filed.

1931, Dec. 1. Brief of Defendant on Motion for a New Trial, filed.

1932, Feb. 8. Bill of Exceptions, filed.

1932, Feb. 9. Notice of filing Bill of Exceptions, issued.

1932, Feb. 12. Notice of filing Bill of Exceptions returned and filed.

1932, Feb. 19. This day being a day in the January Term of Court, the following proceedings were had herein, to wit:

This day this cause came on to be heard on the motion of the defendant to set aside the verdict of the jury heretofore rendered herein, and to grant a new trial; upon due consideration thereof the Court overrules the motion for new trial, to which defendant excepts.

It is therefore considered, ordered and decreed by the Court that the plaintiff recover from the defendant the said sum [fol. 485] of Twenty Thousand Dollars ($20,000.00), the amount of the verdict heretofore rendered herein, together with her costs herein expended. To all of which the defendant duly excepts and is hereby granted leave to prepare and file its Bill of Exceptions herein, according to the statutory provisions. Walter D. Jones, Judge.

Approved: Anderson & Lamb, Attorneys for Plaintiff. Harry T. Nolan & Alvord, Blakely & Ostrander, Attorneys for Defendant.

1932, Feb. 19. Bill of Exceptions refiled; same having been filed heretofore and prior to filing of Journal Entry overruling motion for new trial.

1932, Feb. 23. Bill of Exceptions allowed and signed by Trial Judge.

1932, March 19. Undertaking in Error filed.

1932, March 5. Præcipe filed & Execution #5644 issued.

1932, March 19. Undertaking in Error filed.

1932, April 11. Execution #5644 returned endorsed. Shfs. Rt. Bk. H. Pg. 61. Writ returned not satisfied. Bond to stay execution given. James Moloney, Sheriff, Arthur S. Rand, Deputy. Court of Appeals—J. E. filed—Aug. 19, 1933—"Judgment affirmed, see Journal." Jr. 1—Pg. 256.

1933, Aug. 21. Mandate filed from Court of Appeals.

[fol. 486] IN COURT OF APPEALS OF LAKE COUNTY, OHIO

[Title omitted.]

DOCKET AND JOURNAL ENTRIES.

1932, Feb. 24. Bill of Exceptions, with Exhibits, filed.

1932, Feb. 24. Transcript of Docket & Journal Entries together with original pleadings filed from Common Pleas Court.

1932, March 1. Petition in Error filed.

1932, March 3. Waiver of Summons in Error & Entry of Appearance filed.

1932, March 10. Precipe filed, and Summons in error issued.

1932, March 10. Motion filed.

1932, March 10. J. E. filed: Motion granted; plaintiff in error given leave to file brief by May 1st, 1932. Jr. 1, Pg. 232.

1932, March 14. Summons in error returned endorsed as follows:

Serv. & Ret. .75
Mileage .48

Total $1.23

(Lake Co.) Received this Writ March 10th, 1932, at — o'clock — M., and pursuant to its command on the 10th day of March, 1932, I served the within named Mayme F. Meredith by personally handing to her a true and certified copy of this writ with all the endorsements thereon. James Moloney, Sheriff, By Arthur S. Rand, Deputy.

1932, April 30. Brief of Plaintiff in Error, filed.
1932, April 30. Brief of Plaintiff in Error, filed.
1932, April 30. Brief of Plaintiff in Error, filed.
1932, April 30. Acknowledgment of Service of Brief, filed.
1932, May 10. Motion of deft. in error to extend time of filing brief.
1932, May 10. J. E. filed: Granting motion of def. Jr. 1, Pg. 233.
1932, June 14. Motion filed.
1932, June 14. J. E. filed: Deft. to file brief by July 1st. Jr. 1, Pg. 234.
1932, June 24. Brief of defendant in error filed. (In triplicate.)
1932, June 24. Proof of Service of Brief, filed.
1932, July 5. Motion, filed.
1932, July 5. J. E. filed: Pltf. given leave to file reply brief by August 1, 1932. Jr. 1, Pg. 234.
1932, July 29. Motion of Plff. for extension of time to file brief by Aug. 15, filed.
1932, July 29. J. E. filed: Motion granted. Plff. to file brief by Aug. 15. Jr. 1, Pg. 235.
1932, Aug. 15. Brief of Plaintiff in Error, filed. (In Triplicate.)
1933, March 18. Supplemental Brief of Defendants in Error, filed. (In Triplicate.)
1933, July 28. Opinion of Court of Appeals, filed.

1933, Aug. 19. This day being a day in the August Term of Court, the following proceedings were had herein to-wit:

This cause came on for hearing upon the petition in error, the transcript and original papers and pleadings from the Court of Common Pleas of Lake County, and was argued by counsel and submitted to the court; and, on consideration thereof, the court finds there is no error apparent on the record in said proceedings and judgment; and that in the opinion of the court substantial justice has been done the parties complaining as shown by the record of the proceedings and judgment under review.

It is therefore considered by the court that the judgment aforesaid be, and the same hereby is affirmed; and that the defendant in error recover from the plaintiff in [fol. 487] error her costs herein expended, and the court being of the opinion that there was reasonable grounds for proceedings in error, no penalty is allowed.

It is further ordered that a special mandate be sent to the Common Pleas Court of Lake County, Ohio, to carry this judgment into effect.

To all of which finding and judgment of the court the plaintiff in error excepts. Blosser, Mauck & Middleton, Judges of the Court of Appeals, Lake County, Ohio.

Approved: Alvord, Blakely & Ostrander, Harry T. Nolan, Attorneys for Plaintiff in Error. Anderson & Lamb, Attorneys for Defendant in Error, pr. H. R. Marshall.

1933, Aug. 21. Mandate issued to Common Pleas Court.

1933, Dec. 7. Certified copy of Entry on Motion to Certify Record to Supreme Court—overruling Motion, filed.

[fol. 487a] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 488] IN COURT OF APPEALS FOR LAKE COUNTY, OHIO

#267

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY,
Plaintiff in Error,

v.

MAYME T. MEREDITH, Defendant in Error

Error to Common Pleas

OPINION—July 24, 1933

MIDDLETON, J.:

In the discussion of this proceeding and for convenience and brevity the plaintiff in error will be referred to as the defendant and the defendant in error as the plaintiff. In the trial court the plaintiff recovered a judgment against the defendant in the amount of $20,000 as damages for personal injuries which she claimed she received by and through the negligence of the defendant.

We do not regard it necessary to give in great detail all of the surrounding facts involved in this case. The plaintiff received her injuries in a collision with an engine and cars of the defendant which were running from a point known as the New York Central Railroad interchange to a plant in Painesville, Ohio. It may be observed at this time that the defendant's business appears to be chiefly that of a transfer company as all of its engines are switch engines and the greater part of the tracks owned by it are claimed [fol. 489] to be switches. The collision occurred on July 19th, 1929, at a grade crossing at an improved macadam highway sixty feet in width. The plaintiff with her daughter, a young lady of about twenty years of age, approached the crossing in a Packard automobile. The mother was driving the car and was seated on the side of the car nearest to the approaching train. Bordering on the highway and between the car and the approaching train was an orchard extending along the highway for a distance of approximately eight hundred feet and extending back from the highway and along the right of way of the railroad company about the same distance. The mother and daughter were perfectly familiar with their surroundings as they approached the crossing. While there is some dispute in the evidence it seems to be established that at certain distances from the railroad track and along the public highway approaching trains might be seen through the obstruction of the orchard.

Turning our attention to the approaching train: It consisted of thirty-two cars, twenty-three of which were loaded with slack coal from mines in West Virginia and were consigned to a plant in Painesville. These loaded cars with nine empties were obtained at the said interchange for the purpose, as before observed, of transferring them to their destination in Painesville. A switch engine with tender was pulling the cars and they were running backward, the tender being the first or leading car in the aggregation of cars. The tender and engine and all of the cars were equipped with air brakes but there was no connection made [fol. 490] for air between any of the cars and the engine when the cars left the interchange. The only control, therefore, of the cars in respect to speed and stopping was in the brakes of the engine and tender. The tender was equipped with a standing board extending across the front end and the head brakeman on the train was riding on this board. There was no cab attached to the train and the conductor and rear brakeman were located on the last car. The engineer and fireman made up the remainder of the crew. While it appears in evidence that the track on which the engine and cars were moving was a switch it was not surrounded by other switches or at least the evidence does not so show. In proceeding from the interchange to its destination it passed through an open country and it does not appear that the track was running parallel to other tracks. The run to be made by it was approximately two and one-half miles from the interchange and at the time of the accident, it had traveled about two miles or more from its starting place. Between the interchange and Painesville it had to make three grade crossings, one of which was Route No. 20 from Cleveland to Buffalo, and it appears the highway on which the collision occurred was not an obscure road by any means and it also took care of considerable traffic.

We then have under the facts in evidence this situation. An engine and tender equipped with air brakes were pulling thirty-two cars through an open country for a distance of more than two miles with the only available check that could be made in the movement of the cars being the brakes [fol. 491] on the engine and tender. It is admitted that at the time of the accident the speed of the cars was ten miles per hour. Additional facts will be referred to in the further discussion of the case.

It is apparent from the evidence of both parties that neither the plaintiff nor the employes of the defendant knew of the approach of the other until just immediately before the collision. There is some difference in the evidence as to the exact position of the automobile on the track when the impact occurred but there is no dispute that from that instant until the automobile dropped from the tender and the engine stopped it had traveled six hundred and fifty-seven feet from the crossing. It is immaterial whether the automobile was carried or pushed along the tracks of the defendant for that distance. The important fact is that when the engine stopped a part of the automobile was under the front of the tender and up until the instant that occurred the occupants of the automobile had not received any serious injury. During this horrifying experience of being carried or pushed along the track the mother and daughter were screaming or calling for help and not until the automobile finally dropped under the tender did their appeals cease. When they were finally removed from under the tender it was found that the left leg of the mother was severed between the knee and ankle and the foot remained in the car when she was removed therefrom. Subsequently it was necessary to amputate the leg by reason of its remaining injuries and it was finally [fol. 492] removed about six inches below her hip. The injuries of the daughter were not so severe and the evidence does not establish any great permanent injury to her.

The usual claims were made by the plaintiff of a failure to ring the bell and sound the whistle and the failure to connect the air brakes was fully pleaded in the petition. By the company the charge of contributory negligence on the part of plaintiff was made.

The record as a whole is unusually free from error and particularly is this true in respect to the rights of the defendant. If there was any error in the admission or rejection of evidence the plaintiff may have some ground for complaint.

It is insisted that the testimony of a railroad foreman and a railroad engineer who were called by the plaintiff was incompetent. The substance of their testimony was that an engine and tender properly operated under the conditions described should have stopped the cars from within two to three hundred feet from the point of collision. It is urged that one thing that makes this evidence incompetent is the fact that their interrogation did not include the presence of oil on the track. The answer to this objection is that at that time there was no evidence before the court and jury of any oil on the track. There was no error in the admission of this evidence, and it brings into the case the rule of the last clear chance or known danger. The defendant all through the case and in its briefs has steadfastly maintained that the doctrine of the last clear chance or [fol. 493] known danger has no application to the facts involved in this suit.

Complaint is made of the special instructions given before argument at the request of the plaintiff, and the defendant insists that some of such instructions were inconsistent with the instructions given at its request. There is ground for the contention that the instructions referred to are not consistent but the difficulty with the situation is that the defendant's special instructions one, three and four are clearly erroneous for the reason that they exclude any rights whatever under the rule of the last clear chance or known danger.

We now come to consider some matters in the record involving more serious question. The court in its general charge to the jury said:

> "There are certain stages of the case where as to some of the questions involved it becomes the duty of the court, however reluctantly under the law, to say to you what construction the law places upon the facts without leaving that question to the jury. Some question has been raised as to whether or not the cars in question were a train engaged in interstate commerce under the laws of the United States. That, in the judgment of the court, is a legal proposition which the court and not the jury must determine and the court must assume the full responsibility for such finding. The court therefore instructs you that the engine and thirty-two cars which the defendant was operating at this time were, in the eyes of the law, a train and engaged in

interstate commerce and therefore subject to the law of the United States in that particular."

It is contended that this charge was erroneous and that the cars which were being drawn by the locomotive at the time of the accident did not make a "train". It may be [fol. 494] true in the sense that term is used in railroad regulations this aggregation of cars did not have the equipment required for trains. It had no caboose. It had no markers or signals which the regulations require to identify trains and it was not running under the continued control of any train dispatcher or other official who might have the direction of trains when moving on railroad tracks. But on the other hand it is manifest that the movement of these cars was in no sense a switching movement. The defendant was transferring them from the interchange to their destination. It was concluding the run to be made to their destination under the original assignment. While there is some dispute as to whether when the cars were taken at the interchange they were or were not already coupled yet whether coupled or not there is no proof of any switching after they started from the interchange or that any switching was contemplated from that time until they had traveled a distance of approximately two and one half miles over open country and across highways carrying heavy traffic.

The Supreme Court of the United States in the case of United States v. Erie Railroad Co., 238 U. S. 402, and more particularly in the case of United States v. Railroad Co., 238 U. S. 410, held that the controlling test of whether an aggregation of cars is a train within the provisions of the federal safety appliance act rests in the kind of work in which they are at the time engaged and the character of that work rather than in the name applied by those interested. In the last case cited the court also wholly discounts [fol. 495] the failure to carry a caboose or markers and impliedly any other of the things that are used by railroads to identify trains from other movements. We are therefore unable, under the established facts of the situation as it was when this train proceeded on its way from the interchange, to say it was not a train and that it was in any sense a switching movement by the defendant.

After having thus instructed the jury the court then said:

"The laws of the United States require a train so proceeding and having the legal status that this train had to have at least eighty five per cent of the cars on such train equipped with air brakes so that by the use of air as applied thru these brakes, in addition to the air brake on the engine, the rain can be controlled by the engineer. It became therefore the duty of the defendant company in this case in starting this train of cars out to provide that the air brakes on at least eighty five per cent of those cars should be in working order, so that they could be controlled from the engine and in addition to the air brake on the engine and tender itself, and the failure of the railroad company to so provide the equipment in the manner that it should be used to control, check or stop the progress of the train would, in the eyes of the law, be negligence, and for the direct and proximate consequence of such negligence the defendant company would be liable, the burden of proof being upon the plaintiff to show by preponderance of the evidence that such omission was the direct and proximate cause of the injury to the plaintiff in this case."

The foregoing parf of the charge is also attacked and it is apparent that standing alone it would include a very doubtful legal conclusion. We are not prepared to say that the failure of the defendant to connect eighty five per cent of the cars in this train for air service was such neg- [fol. 496] ligence as would make the company liable for all of its direct and proximate consequences unless it should further appear that the plaintiff herself was without fault. The defense of contributory negligence was wholly eliminated by what was then said. However, the court immediately followed the foregoing charge with the following instruction:

"In considering whether such omission in this case was the direct cause you may consider from the evidence in this case what length of time after the plaintiff's perilous position was made known to the crew of the train the train could have been stopped if the air brakes had been in condition to be used and had been used. If the plaintiff was originally at fault there was no negligence on the part of the railroad company as to giving the signal and after the position of the plaintiff was discovered even the application of the air brakes on the train—if the train had been equipped for that purpose—if that had been inefficient to stop the train and have avoided the injury then, of course, the failure to equip with air brakes would not be the proximate cause of the injury. It would have happened anyhow, brakes or no brakes."

Taking the charge quoted as a whole it plainly indicates that the court had in mind at the time it was given the doctrine of the last clear chance or known danger, and that said instructions were given with a view of directing the jury to apply that rule. The court had already in a special instruction to the jury and at the request of the plaintiff fully explained to the jury under what circumstances and conditions the plaintiff was entitled to recover even if she was found to be guilty of contributory negligence. In the charge under consideration, however, the court added to [fol. 497] what was said in the special instruction and said to the jury that the failure of the defendant to comply with the federal statutory requirements might be considered in determining the negligence of the defendant after it discovered the danger of the plaintiff.

Whether pre-existing negligence may be considered in determining responsibility under the known danger rule appears to be a debatable question in the courts. In some jurisdictions recovery is permitted for a pre-existing negligence while in other jurisdictions it is denied.

Among the cases adopting the latter rule is that of Illinois Central Railway Co. v. Nelson, 173 Fed. 915, in which the court held:

"Under the rule that a railroad company may be liable for the injury of a person at a crossing, notwithstanding his contributory negligence, if after actually discovering his peril the servants of the company could by the exercise of ordinary care have avoided his injury but failed to do so, the company cannot be held liable if such failure resulted from a defect in appliances of the train, which existed previously, and which made it impossible to stop the train in time, notwithstanding the efforts of the trainmen."

It was further said in that case:

"A defect in mechanical appliances, existing before and continuing until after the injury, not susceptible of being rectified after the discovery of the danger carelessly incurred and before the injury is done, is not supervening negligence within the rule invoked. Were it otherwise, negligence on the part of others would have to be anticipated and provided for in adopting precautions to prevent accidents, but that is not in the measure of one's duty."

[fol. 498] It is obvious, we think, that the controlling principle in the above case rests on the rule that in ordinary negligence the tort feasor is not bound to anticipate acts of contributory negligence. The instant case depends on facts wholly different in their legal bearing on the rights of the parties involved. We will discuss this question later.

Among the cases which allow recovery attention is called to Thompson v. Salt Lake Rapid Transit Co., 16 Utah 281, 52 Pac. 92. That case involved facts very similar to the facts shown in the instant case. A deaf and dumb boy between the ages of fourteen and fifteen years was struck by a street car of the defendant company under such circumstances as to clearly establish his contributory negligence. As against the company, however, it was shown that the motor and brakes of its car were out of repair and that had the car been under proper control it could have been stopped before colliding with the boy. The court in passing upon this case said:

"Appellant's counsel contend that conceding the fact that the defendant was negligent in sending out a defective car and that the deceased was also negligent in crossing the track in front of the car, in such a case it was the only duty of the defendant, after discovering the dangerous situation of the deceased, caused by his own negligence, to exercise all reasonable care and diligence at his command at the time of the injury, and that when the motorman did all he could to stop the car, altho its brakes were defective, the defendant could not be held liable, even if the car had been sent out in a defective condition with the defendant's knowl- [fol. 499] edge; that, as nothing could be done by the motorman after the discovery of the boy's negligence to remedy the defective condition of the car, all that he was required to do was to use the defective appliances which he had to stop the car; that, if the deceased was guilty of contributory negligence, the unsafe and defective condition of the car, altho known to the defendant, was not the proximate cause of the injury."

The court commenting upon this argument said:

"This position of able counsel for the defendant is not only ingenious but is apparently supported by some authority bearing upon the general question of contributory negligence; but we can not subscribe to such a doctrine when applied to the operation and management of electric cars upon the streets in a city where the lives and safety of pedestrians are largely dependent upon the safe equipment and perfect condition of the appliances with which a street car is propelled, operated and controlled. If such a doctrine should be established it would practically place the exclusive right to the use of the street occupied by the street car company in such company, to the exclusion of the citizens. If the citizen used the street he would do so at the peril of his own safety. If such rules were applicable to contributory negligence his safety in crossing a street where street cars were operated, with his right to recover damages in case of negligence, would largely depend upon the option of the company to keep its appliances in good repair. In case of his injury by its negligence the fact of such negligence on the part of the company would be a bar to his recovery in case he contributed to the accident, which the company could by the use of reasonable care have avoided."

In the instant case we do not have such surroundings as obtained in the Utah case but we do have a direct violation of a federal statute under which the defendant was required [fol. 500] before leaving the interchange to connect at least eighty five per cent of the cars in the train for air, and because of that mandatory duty it must be conclusively presumed to have anticipated all consequences of its negligence, which responsibility continued present during all the time it operated the train in its defective condition. When, therefore, the collision happened it was an existing negligence which made it impossible to save the plaintiff from injury. In the instant case, at most, the plaintiff violated no rule except the natural law to use ordinary care for her own protection and the defendant violated a federal law enacted for the protection not only of railroad employes and passengers on railroad trains but the public generally who are brought in contact with railroads and who might be subjected to danger if such rules were not observed. To hold that the failure to use air brakes after the discovery of plaintiff's danger was not then an action neglige would abrogate the rule of known danger. It would under such working of that rule free all railroads from any liability while operating in violation of air brake requirements.

It is our conclusion that there is no error in the record prejudicial to the rights of the defendant which would warrant a reversal of the judgment and it is affirmed.

Judgment affirmed.

Blosser, P. J., and Mauck, J., Concur.

Decided July 24, 1933.

[fol. 501] Blosser, P.J., Middleton and Mauck, JJ. of the fourth district, sitting by designation.

Alvord, Blakely & Ostrander and Harry T. Nolan, attorneys for plaintiff in error.

Anderson & Lamb, attorneys for defendant in error.

[fol. 502] Clerk's certificate to foregoing paper omitted in printing.

[fol. 503] IN SUPREME COURT OF OHIO

DOCKET AND JOURNAL ENTRIES

No. 24377

Title

THE FAIRPORT, PAINESVILLE AND EASTERN RAILROAD COMPANY

vs.

MAYME F. MEREDITH

Action: Motion for an order directing the Court of Appeals of Lake County to certify its record.

Attorneys: For plaintiff in error, Alvord, Blakely & Ostrander; Harry T. Nolan, Painesville; for defendant in error, Anderson & Lamb, Cleveland.

Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders and Decrees

1933.

August 23. Motion for an order to certify, notice, proof of service and plaintiffs in error printed brief on motion filed.

November 1. Defendant's printed brief filed. 11-2-33 proof of service filed.

November 17. Plaintiff's printed reply brief filed. 11-18-33 proof of service filed.

November 29. Motion for an order directing the Court of Appeals of Lake County to certify its record overruled. J. 33 page 309.

December 6. Certified copy of entry sent Clerk.

Journal Entry

November 29, 1933.—Motion for an order directing the Court of Appeals of Lake County to certify its record. It is ordered by the Court that this motion be, and the same is hereby, overruled. J. 33 page 309.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 504] IN SUPREME COURT OF OHIO, OF THE TERM OF JANUARY, A. D. 1933

No. 24377

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY,

vs.

MAYME F. MEREDITH

ORDER OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF LAKE COUNTY TO CERTIFY ITS RECORD—November 29, 1933

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 505] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO EXHIBITS—Filed Feb. 17, 1934

The parties hereto, by their respective attorneys, hereby stipulate and authorize the elimination of the exhibits from the printed record for use in the presentation to the Court in connection with the petitioner's petition for writ of certiorari.

Elbert F. Blakely, Harry T. Nolan, Thos. — Kirby, Attorneys for Petitioner. Anderson & Lamb, Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 19, 1934.

The petition herein for a writ of certiorari to the Court of Appeals of the State of Ohio, 7th Judicial District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court of the United States

OCTOBER, 1933 TERM.

No. ....

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals, Seventh Judicial District of Ohio, Lake County, being the highest Court of said State in said Action (the Supreme Court of Ohio refusing to certify the Record), and

BRIEF IN SUPPORT THEREOF.

ELBERT F. BLAKELY,
HARRY T. NOLAN,
Painesville, Ohio,
THOMAS M. KIRBY,
Cleveland, Ohio,
Attorneys for Petitioner.

ALVORD, BLAKELY & OSTRANDER,
SQUIRE, SANDERS & DEMPSEY,
Of Counsel.

INDEX TO PETITION.

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Authorities Cited.

Constitution of Ohio, Article IV, Sections 2 and 4.... 8, 9

Safety Appliance Act, U. S. Statutes, Title 45, Chapter 1, and the Order of the Interstate Commerce Commission of June 6th, 1910....................... 9

U. S. C. A. (Judicial Code, 237) Section 344, Sub-section (b) 10, 12

American Railway Express Co. vs. Levee, 263 U. S., 19 10

In the Supreme Court of the United States

OCTOBER, 1933 TERM.

No. ....

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals, Seventh Judicial District of Ohio, Lake County, being the highest Court of said State in said Action (the Supreme Court of Ohio refusing to certify the Record).

To: THE HON. CHARLES EVANS HUGHES, *Chief Justice*, and
ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Your petitioner, THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY, respectfully prays for a Writ of Certiorari herein to review a certain final decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, being the highest Court of said State passing upon the questions involved in the above entitled action since the Supreme Court of Ohio under Constitutional right (Ohio Constitution, Secs. 2 and 4 of Art. 4) in its discretion refused to certify for review the said record of said Court of Appeals, Seventh Judicial District of Ohio, Lake County. (Record, page 358.)

Your petitioner, The Fairport, Painesville & Eastern Railroad Company, respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Action in an Ohio Court for personal injury to the driver of an automobile struck by a train at a highway crossing, to recover damages sustained by the collision, based in part upon a violation of Federal Safety Appliance Act, U. S. Statutes, Title 45, Chapter 1, and an order of the Interstate Commerce Commission June 6th, 1910, requiring that any train operated with power or train brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85% shall have their brakes so used and operated.

II.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(a) The case was tried in the lower State Court at the September 1931 Term thereof, and resulted in a verdict by a jury and a judgment in favor of the respondent (plaintiff). (Record, page 344-5) Petitioner (defendant) appealed to the Court of Appeals, Seventh Judicial District of Ohio, Lake County, whose judgment was in favor of respondent (plaintiff). (Record, page 347..) Petitioner (defendant) applied to the State Supreme Court for an Order to Certify the Record of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, for review, which review was denied. (Record, page 358..)

(b) By the decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, in its application of said Safety Appliance Act and the rule of the Interstate Commerce Commission thereunder, to a driver of an automobile on a highway, made the defendant (petitioner) guilty of negligence *per se* and deprived your petitioner of the defense of "contributory negligence," contrary to law.

(c) The decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, misapplied the Federal Safety Appliance Act as amended and the order of the Interstate Commerce Commission thereunder, to the benefit of a person on the highway, when by its terms it was enacted solely for the benefit of employes and passengers on trains.

(d) The question involved is one of great general interest and no Federal Court case has been found where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employes and travelers upon the railroad itself.

JURISDICTION.

The Statutory provision which is believed to sustain the jurisdiction of this Court, is Sub-Section (b) of Section 344, U. S. C. A. (Judicial Code 237), an excerpt from that Section being:

> "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States. * * *"

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Court of Appeals, Seventh Judicial District of Ohio, Lake County, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Court of Appeals, Seventh Judicial

District of Ohio, Lake County, had in the case numbered and titled on its docket: "The Fairport, Painesville & Eastern Railroad Company, Plaintiff in Error vs. Mayme F. Meredith, Defendant in error," No. 227.

A certified copy of the record and the opinion of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, will be found on pages 348 to 357 of the Record, and are tendered herewith as a part of this petition.

Respectfully submitted,

Elbert F. Blakely,
Harry T. Nolan,
Painesville, Ohio,

Thomas M. Kirby,
Cleveland, Ohio,
Attorneys for Petitioner.

Alvord, Blakely & Ostrander,
Squire, Sanders & Dempsey,
Of Counsel.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

THOMAS M. KIRBY, being first duly sworn, says that he is one of the attorneys for the petitioner, THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY, a corporation, and makes this verification duly authorized in the premises for and in its behalf; that he has read the foregoing petition and that the allegations therein contained are true as he verily believes.

THOMAS M. KIRBY.

SWORN TO BEFORE ME and subscribed in my presence this 7th day of February, 1934.

CARRIE E. JACOB,
Notary Public.

(Seal)

(Carrie E. Jacob
Notary Public
My Commission Expires Dec. 14, 1936.)

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States of America; that I have prepared and examined the foregoing petition and that in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

THOMAS M. KIRBY.

In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. ....

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion in the Court of Appeals, Seventh Judicial District of Ohio, Lake County, was not reported, but a certified copy appears in the Record at pages 349 to 357.

The question is: Does the Safety Appliance Act and orders issued thereunder by the Interstate Commerce Commission, impose a duty upon a railroad to travelers in automobiles on the public highways?

ARGUMENT.

I.

STATEMENT OF CASE.

The defendant below (petitioner), is a short-line switching railroad, and on the morning of the 19th of July, 1929, had started a train from what is known as the "New York Central interchange" en route to the Village of Fairport two miles distant. About one and one-half miles from the interchange the railroad crosses a public highway at grade and at that point said train came into collision with an automobile which the plaintiff (respondent) was driving, resulting in serious injuries to her person. The usual allegations of negligence in such cases were made against the defendant company (petitioner), and in addition thereto, namely, in the sixth paragraph of the assignments of negligence, it was averred as a specification of negligence, that:

> "In failing to obey the laws of the State and the United States which were then in full force and effect in reference to maintaining the use of air in and on said cars of said train which would have supplied full force for the application of all the brakes as aforesaid." (Record, page 8...)

The Trial Court based a charge upon that averment to the effect that a violation of the Safety Appliance Act was negligence *per se*, and, if a proximate cause of the accident, would entitle the plaintiff (respondent) to recover. (Record, page 335-6)

The trial resulted in a verdict in favor of the plaintiff below (respondent). Judgment was duly entered, from which judgment error proceedings were prosecuted to the Court of Appeals, Seventh Judicial District of Ohio, Lake County, and the judgment of the lower Court was affirmed. (Record, page 347..) All rulings anent the Safety Appliance Act and orders thereunder, were duly excepted to by the petitioner throughout the trial and in the Court of Appeals. An Application for an Order to Certify the Record to the Supreme Court of Ohio was duly filed and denied under the discretionary authority vested in said Court by Sections 2 and 4 of Article IV of the Constitution of the State of Ohio. (Record, page 358)

II.

ASSIGNMENTS OF ERROR.

(a) The decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, was erroneous in affirming the judgment of the lower Court wherein that Court held that the Safety Appliance Act, U. S. Statutes, Title 45, Chapter 1, and the order of the Interstate Commerce Commission of June 6th, 1910, inured to the benefit of the plaintiff below (respondent) while driving her automobile upon a highway over the crossing of the defendant (petitioner).

(b) The Court of Appeals, Seventh Judicial District of Ohio, Lake County, erred in holding:

> "The defendant violated a Federal law enacted for the protection not only of railroad employes and passengers on railroad trains but the *public generally* who are brought in contact with railroads and who might be subjected to danger if such rules were not observed." (Record, page 556-7.) (Italics ours.)

(c) The Court of Appeals, Seventh Judicial District of Ohio, Lake County, erred in sustaining the judgment of the lower Court.

III.

JURISDICTION.

The judgment to be reviewed is that of the Court of
1 Appeals, Seventh Judicial District of Ohio, Lake County, rendered ~~February~~ Aug 19th, 193~~4~~3 (Record, page 547.), and this for the reason that a Motion to Certify the Record to the Supreme Court of Ohio was denied on November 29th, 1933. (Record, page 558.)

By virtue of Sections 2 and 4 of Article IV of the Constitution of Ohio, the right to review a judgment of an intermediate tribunal is discretionary.

> "When by the constitution of a State the jurisdiction of its highest court to review a judgment of an intermediate tribunal is discretionary, and review is declined, the writ of certiorari from this Court should be addressed to the intermediate tribunal."
>
> "The limit of time for applying here for certiorari dates from the refusal of the highest state court to review the decision of the intermediate court."
>
> *American Railway Express Co. vs. Levee*, 263 U. S. 19.

The Federal Statutory provision which is believed to sustain the jurisdiction of this Court, is Sub-section (b) of Section 344, U. S. C. A. (Judicial Code, 237), reading in part as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty *or statute* of, or commission held or authority exercised under, the United States; * * *:" (Italics ours.)

The decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, in our opinion, entitles the petitioner to a writ of certiorari, for by the decision of that Court the Federal Safety Appliance Act, as amended, and the order issued by the Interstate Commerce Commission of June 6th, 1910, was permitted to inure to the benefit of one not included within the Act or order, namely, a traveler on the highway.

The sole question is:

> Does the Safety Appliance Act and orders made thereunder impose a duty upon the railroad to persons other than employes and passengers on trains?

The plaintiff's (respondent's) petition, in the Sixth Specification of Negligence, as well as in the charging language of the body of the petition, alleged as a basis for recovery against the petitioner, as follows:

> "In failing to obey the laws of the State and the United States which were then in full force and effect in reference to maintaining the use of air in and on said cars of said train which would have supplied full force for the application of all the brakes as aforesaid." (Record, page 8....)

In charging upon this portion of the averments of the petition, the Trial Court made the requirements of the Safety Appliance Act, as amended, and the order issued by the Interstate Commerce Commission thereunder, applicable to a person, who was neither an employe of defendant (petitioner) nor a passenger on said train, but the driver of an automobile upon a public highway which crossed the tracks of the railroad company.

And again in the course of the charge (Record, page 335-336), the Court said in its instruction to the jury as to what should be considered negligence upon the part of the defendant (petitioner) upon which the plaintiff (respondent) could recover:

> "The laws of the United States require a train so proceeding and having the legal status that this train had, to have at least 85% of the cars on such train equipped with air brakes so that by the use of air as applied through its brakes in addition to the air-brake on the engine, the train can be controlled by the engineer. It became, therefore, the duty of the defendant company in this case in starting this train of cars out, to provide that the air-brakes on at least 85% of those cars should be in working order so that they could be controlled from the engine, and in addition to the air-brake on the engine and tender itself; and the failure of the railroad company so to provide the equipment in the manner in which it should be used to control,

stop or check the progress of the train, would, in the eyes of the law, be negligence and for the direct and proximate consequence of such negligence, defendant would be liable." (Record, page 335-336

The decision of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, in affirming the trial Court's interpretation of the Safety Appliance Act, is erroneous and violative of the Federal Law.

In the course of its opinion the Court of Appeals, Seventh Judicial District of Ohio, Lake County, said (Record, page ...): 356-357

> "We do have a direct violation of a Federal Statute under which the defendant was required before leaving the interchange, to connect at least 85% of the cars in the train for air, and because of that mandatory duty, it must be conclusively presumed to have anticipated all consequences of its negligence, which responsibility continued present during all the time it operated its train in this defective condition. * * * The defendant violated a Federal law enacted for the protection not only of railroad employes and passengers on railroad trains *but the public generally* who are brought in contact with railroads and who might be subjected to danger if such rules were not observed." (Italics ours.)

We submit, therefore, that such decision is one which this Court has the right to, and should, review, since by its affirmance of the decision of the lower Court in relation to the averments of the petition and the charge of the Court, this is a case reviewable under Subsection (b) of Section 344 of U. S. C. A., *supra*.

No cases in the Courts of the United States have been found where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employes and travelers upon the railroad itself.

The preamble to the Act reads:

> "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive-wheel brakes, and for other purposes."

We find nothing in the preamble or the text of the Federal Safety Appliance Act, as amended, or in the order of the Interstate Commerce Commission of June 6th, 1910, where the provisions of that Act or order have been applied for the benefit of a traveler on the highway. The original Safety Appliance Act relative to air brakes required 50% of successive usability, while the order of the Interstate Commerce Commission of June 6th, 1910, raised that percentage to 85%.

SUMMARY.

(a) That this is a cause where a title, right, privilege or immunity is specially set up or claimed by either party under a statute of the [illegible]nited States and is one which is competent for the Supreme Court, by certiorari, to review and determine;

(b) That it is one wherein a Statute of the United States is asserted and wrongfully applied;

(c) That the Federal Safety Appliance Act and the rule of the Interstate Commerce Commission under date of June 6th, 1910, have no application, and the finding of the Court of Appeals, Seventh Judicial District of Ohio, Lake County, to the contrary, is erroneous and violative of the terms of the Federal Act and the order thereunder, and wrongfully construes the same as negligence *per se* with the deprivation to the defendant below (petitioner) to the benefit of the doctrine of "contributory negligence";

(d) That this decision, being a decision of the intermediate Court, and the Ohio Constitution providing for discretionary jurisdiction to review a judgment of such intermediate tribunal, and the review being declined, this Court has the right to issue a writ of certiorari addressed to the said intermediate tribunal;

(e) That no Federal decision has been rendered where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employes and travelers upon the railroad itself;

(f) Neither the Safety Appliance Act nor the order thereunder, applies to one other than an employe or passenger.

CONCLUSION.

The importance of a decision of this Court upon the question "Does the Safety Appliance Act and orders made thereunder, impose a duty upon railroads to others than employes and passengers on trains?", is obvious, and we submit that your petitioner is entitled to an issuance of a writ of certiorari for a review of the decision of the Court below;

The question presented by the record of the Court below is one of great and general public interest, and in our opinion, should be settled by this Honorable Court.

Respectfully submitted,

Elbert F. Blakely,
Harry T. Nolan,
Thomas M. Kirby,
Attorneys for the Petitioner.

Alvord, Blakely & Ostrander,
Squire, Sanders & Dempsey,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER, [illegible] TERM

No. 820.

THE FAIRPORT, PAINESVILLE AND EASTERN
RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

BRIEF FOR PETITIONER.

ELBERT F. BLAKELY,
HARRY T. NOLAN,
Painesville, Ohio,
ATLEE POMERENE,
THOMAS M. KIRBY,
Cleveland, Ohio,
Attorneys for Petitioner.

[illegible], BLAKELY & [illegible],
SQUIRE, SANDERS & DEMPSEY,
Of Counsel.

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THE FAIRPORT, PAINESVILLE AND EASTERN
RAILROAD COMPANY,
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vs.

MAYME F. MEREDITH,
Respondent.

BRIEF FOR PETITIONER.

THE CASE.

This case comes into this Court by reason of the granting of a Writ of Certiorari (Record, page 360) to the Court of Appeals of the State of Ohio, 7th Judicial District, being the highest court of said State in this action, the Supreme Court of Ohio having denied an application for an order to certify the record of the said Court of Appeals for review. (Record, page 358.)

The case was tried originally in the Common Pleas Court of Lake County, Ohio, and was an action to recover damages for personal injury to the driver of an automobile struck by a train at a highway crossing.

The trial to a jury resulted in a verdict for the plaintiff, (Respondent) and judgment was rendered thereon (Record, pages 344-5), which judgment was affirmed by the Court of Appeals. (Record, page 347.) The opinion in the Court of Appeals was not reported at the time petition for Writ of Certiorari was filed in this Court, but a certified copy thereof appears in the record at pages 348 to 357. Since that time advance sheets containing the opinion have appeared in the Ohio Bar Association Report Vol. VII, No. 4, and the case will be reported later in 46 Ohio Appellate Reports, page 457.

THE QUESTION.

The question is: Does the Federal Safety Appliance Act and orders issued thereunder by the Interstate Commerce Commission, requiring that not less than 85% of the cars of a train moving interstate traffic shall be operated with power or train brakes, impose a duty upon a railroad to a traveler in an automobile on the public highway?

THE FACTS.

The defendant below (Petitioner) is a short line railroad with a switch line of about 2 miles running from the interchange of the New York Central Railroad to the Village of Fairport, furnishing switching facilities to several industries.

On the afternoon of July 19, 1929, a switch engine of the defendant below started from said interchange with 32 cars in interstate traffic enroute to Fairport Village. About 1½ miles from the interchange the railroad intersected a public highway at grade, where the accident occurred. The intersection was approximately at right angles. At that point there was a slight down grade on the railroad, and a very slight up grade on the highway which was paved to a width of 18 feet. The engine and tender were operated by air brakes, but the air hose was not coupled between any of the cars. It is impracticable in switching movements to couple the air because of the difficulty in cutting off cars so coupled. The only time when the air hose could have been coupled was while the cars were at the New York Central interchange before the movement commenced, about one-half hour prior to the accident.

The day was clear and the pavement dry. The train approached the crossing from the East going toward the West at the rate of about 10 miles per hour. The plaintiff (Respondent) was driving South operating a Packard sedan, which she was accustomed to drive, and was accompanied by her daughter, who was sitting at her right. She was familiar with the railroad crossing, having driven over it frequently for many years. The view to the East whence the train was approaching was obstructed by an apple orchard. When plaintiff was 200 feet from the crossing, she looked through the orchard to her left (East) but failed to see the train. (Record, pages 117-121.) *From that time on until she was actually upon the railroad tracks, she did not look in the direction from which the train was approaching and did not see the train until the instant she was struck.* (Record, pages 106-116-117-118.) The daughter did not look toward the East at all until just as the collision occurred. (Record, page 94.) Plaintiff's evidence was that when she was 52 feet distant from the North rail, she had an unobstructed view to the East along the railroad tracks for a distance of 52 feet, when 40 feet from the North rail she had an unobstructed view for a distance of 78 feet. (Record, pages 50-51.) The range of vision increased rapidly so that from a point 22 feet from the North rail, until she was struck, the view was entirely unobstructed. (Record, pages 255-256.)

Plaintiff testified that she was driving on the right side of the pavement (Record, page 117), that at a point 200 feet from the crossing she began to slow down, running for some distance 7 or 8 miles per hour and than as she neared the crossing she slowed down to 2 or 3 miles per hour maintaining that speed until the collision occurred. (Record, pages 91-92.) The front wheels of the automobile were approximately at the South rail of the track and the rear wheels of the automobile were approximately at the North rail of the track at the moment of impact.

The engine drawing the train was in backward movement, the rear part of the tender first reaching the crossing and colliding with plaintiff's automobile. A full crew was in charge; the engineer was on the southerly side of the cab, and the fireman was on the northerly side, both looking in the direction in which they were moving. The head brakeman was riding on the footboard at the rear end of the tender, that being the part of the tender first to reach the crossing; the conductor and the rear brakeman were riding in a hopper car at the rear end of the train, no caboose being attached. As soon as the head brakeman and the fireman saw that the automobile was not stopping, they signalled the engineer to stop the train. (Record, pages 219-237-243); the engineer at once applied the air brakes on the engine and tender (Record, page 237), but could not apply the air brakes on the cars, none of the hose being connected; the fireman reached the car next to the engine and set the hand brake, but the train stopped before he had time to go further (Record, page 238); the head brakeman, after signalling for the stop, climbed up the rear end of the tender to avoid being struck (Record, page 220); the conductor and rear brakeman did not know there had been an accident until after the train came to a stop.

The automobile was pushed along the track in front of the tender for a distance of over 600 feet. The crankcase on the automobile was so damaged by the collision that oil gradually ran out and smeared one rail of the track for a long distance, and the other rail for a shorter distance. (Record, pages 222-223-241-267-280.) Twenty-three of the 32 cars were loaded with coal, making a heavy train for a switch engine to handle. After plaintiff's dangerous position was known, the crew did everything in its power to prevent injury to her.

STATEMENT OF THE CASE.

The plaintiff (Respondent) pleaded the Federal Safety Appliance Act; averring that the defendant (Petitioner) was negligent

> "in failing to obey the laws of the State and the United States which were then in full force and effect in reference to maintaining the use of air in and on said cars of said train which would have supplied full force for the application of all the brakes as aforesaid." (Record, page 8.)

The plaintiff offered evidence in support of that allegation, and the trial court charged that the failure of the railroad to connect the air to the 32 cars was negligence *per se*, and, if a proximate cause of the accident, would entitle the plaintiff to recover. (Record, pages 335-336.) The charge of the court in that respect was as follows:

> "The court therefore instructs you that the engine and thirty-two cars which the defendant was operating at this time, were in the eyes of the law a train and engaged in interstate commerce, and therefore subject to the law of the United States in that particular. The laws of the United States require a train so proceeding and having the legal status that this train had, to have at least 85 per cent of the cars on such train equipped with air brakes, so that by the use of air as applied through those brakes, in addition to the air brake on the engine, the train can be controlled by the engineer. It became, therefore, the duty of the defendant company in this case in starting this train of cars out to provide that the air brakes on at least 85 per cent of those cars should be in working order so that they could be controlled from the engine, and in addition to the air brake on the engine and tender itself; and the failure of the railroad company to so provide the equipment in the manner that it should be used to control, check or stop the progress of the train, would in the eyes of the law be negligence; and for the direct and proximate consequence of such neg-

ligence the defendant company would be liable—the burden of proof being upon the plaintiff to show by a preponderance of the evidence that such omission was the direct and proximate cause of the injury to the plaintiff in this case." (Record, pages 335-336.)

This case was taken on error to the Court of Appeals of the 7th Judicial District of Ohio, where the judgment was affirmed. The Court of Appeals in its opinion said:

> "In the instant case * * * we do have a direct violation of a federal statute under which the defendant was required before leaving the interchange to connect at least eighty five per cent of the cars in the train for air, and because of that mandatory duty it must be conclusively presumed to have anticipated all consequences of its negligence, which responsibility continued present during all the time it operated the train in its defective condition. When, therefore, the collision happened it was an existing negligence which made it impossible to save the plaintiff from injury. In the instant case, at most, the plaintiff violated no rule except the natural law to use ordinary care for her own protection and the defendant violated a federal law enacted for the protection not only of railroad employes and passengers on railroad trains *but the public generally* who are brought in contact with railroads and who might be subjected to danger if such rules were not observed." (Italics ours.) (Record, pages 336-357.)

ASSIGNMENTS OF ERROR.

The Court of Appeals, Seventh Judicial District of Ohio, Lake County, erred:

(a) In affirming the judgment of the lower Court wherein that court held that the Safety Appliance Act inured to the benefit of the plaintiff below (Respondent);

(b) In holding that

"The defendant violated a Federal law enacted for the protection not only of railroad employes and passengers on railroad trains but the public generally who are brought in contact with railroads and who might be subjected to danger if such rules were not observed." (Record, pages 356-7.)

(c) In sustaining the judgment of the lower Court.

ARGUMENT.

I.

SUMMARY.

(a) This is a case wherein a statute of the United States is asserted and wrongfully applied.

(b) The Federal Safety Appliance Act and the rule of the Interstate Commerce Commission made thereunder have no application to this case, and the finding of the court below to the contrary is erroneous.

(c) The Safety Appliance Act and the order thereunder applies to employes and passengers, but not to a traveler upon the public highway.

(d) The holding of the court below construing the violation of the Federal Safety Appliance Act as negligence *per se* deprived the defendant below (Petitioner) of the benefit of the doctrine of contributory negligence.

II.

THE SAFETY APPLIANCE ACT.

No cases in the Courts of the United States have been found where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employees and travelers upon the railroad itself.

The passage of the original Safety Appliance Act was due largely to the efforts of President Harrison. In his first annual message to Congress he said:

> "The attention of the Interstate Commerce Commission has been called to the urgent need of congres-

> sional legislation for the better protection of the lives and limbs of those engaged in operating the great interstate freight lines of the country, and especially of the yardmen and brakemen." * * * "During the year ending June 30, 1888, over two thousand railroad employes were killed in service, and more than twenty thousand injured. It is competent, I think, for Congress to require uniformity in the constructions of cars used in interstate commerce, and the use of improved safety appliances upon such trains."

Again in his annual message of December 9th, 1891, he said:

> "I have twice before urgently called the attention of Congress to the necessity of legislation for the protection of the lives of railroad employes, but nothing has yet been done." * * * "A law requiring of every railroad engaged in interstate commerce the equipment each year of a given per cent of its freight cars with automatic couplers and air brakes would compel an agreement between the roads as to the kind of brakes and couplers to be used, and would very soon and very greatly reduce the present fearful death rate among railroad employes."

The Safety Appliance Act was subsequently enacted by Congress and became effective, March 2, 1893. On March 2nd, 1903, an amendment was made fixing the minimum percentage (50%) of cars in a train required to have air brakes in operation, and authorizing the Interstate Commerce Commission to increase such minimum percentage. The complete text of the Act and the amendment referred to, and the order of the Interstate Commerce Commission made thereunder, whereby the minimum percentage was increased to 85%, is found in Appendix A to this brief. The Act was supplemented April 14, 1910, 36 Stat. at Large, 298, but not affecting the provisions relating to air brakes.

Having observed the purpose sought to be accomplished by President Harrison by these recommendations, to-wit: the better protection of the lives and limbs of railroad employees, let us now turn to the Act itself, to determine from its provisions the class of persons for whose benefit the legislation was enacted.

The title of the Act indicates its purpose, and is as follows:

> "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes."

We realize that the title of an Act is no part of the Act itself, but it often is indicative of the purpose sought to be accomplished by the legislature. It is to be noted that the Act is one "to promote the safety of employes and travelers upon railroads." These are the only classes of persons named. "Travelers upon railroads" having been included, certainly travelers upon highways are excluded. "*Inclusio unius est exclusio alterius.*" Considering now the original Act, we find in Section I the requirement is, that a sufficient number of cars must be equipped with power or train brakes so "that the engineer on the locomotive drawing such train can control its speed *without requiring brakeman to use the common hand brake for that purpose.*" (Italics ours.) It is evident that the purpose was to protect the brakeman.

We quote from *Thornton's Federal Employers' Liability Act,* Section 227, as follows:

> "It is clear that the intention of Congress in the passage of the Safety Appliance Act, was to, in a measure, secure the safety of employes of railroads in moving cars in interstate commerce."

Clay vs Atchison T. & S.F. Ry.Co.
210 S W Rep. 1072.

On this point another recognized authority says:

> "Whether the act exists for the protection of railroad employes other than trainmen, cannot, in the absence of controlling federal decisions upon that point, be authoritatively stated."

Roberts Federal Liability of Carriers, Vol. 2, Sec. 718.

Other authorities to the same effect are:

> "New Mexico constitution providing that it shall be unlawful for any railroad corporation knowingly and wilfully to use and operate any defective car or locomotive, and that the railroad shall be liable to any employe injured through defect in any car, locomotive, or attachments, etc., relate exclusively to employes of railroad, and have no application in the case of other persons injured or killed through the negligence of a railroad."

Grand Rapids, etc. Ry. Co. vs. U. S., 249 Federal Reporter 650 (Circuit Court of Appeals, Sixth Circuit, Feb. 16, 1918);

Virginian Ry. Co. vs. U. S., 223 Fed. 748, 751.

We call the attention of the Court to the case of

St. Louis & San Francisco Railroad Co. vs. Conarty, Admx., 238 U. S. 243,

which was a case where the benefit of the Safety Appliance Act was denied even to an employee. We quote from the opinion at page ~~240~~: 250

> "We are of opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the supreme court of the state erred in concluding that

> the safety appliance acts required it to hold otherwise.''

The rule laid down in the case above mentioned was broadened in the case of

> *Louisville & Nashville Railroad Company vs. Layton,* 243 U. S. 617,

so as to include all employees injured in the discharge of their duty, as a proximate result of the violation of the act. See also,

> *Lang vs. New York Central R. Co.,* 255 U. S. ~~458~~ 455;
> *Davis, Agent, etc. vs. Wolfe,* 263 U. S. 239 at page 241, where the *Conarty, Lang* and *Layton* cases are reviewed.

If we are correct in our interpretation of this Act, then the well known rule applies that the violation of a statutory duty is the foundation of an action in favor of such persons only as belong to the class intended by the legislature to be protected by such statute, and it follows that the plaintiff (Respondent) was not entitled to the benefit of the Safety Appliance Act.

> ''Negligence is the failure to comply with some duty imposed by law. But in order that an act of negligence may be the predicate of any action, it is necessary that the duty should have been imposed for the benefit of the person injured and that the violation of the duty be the proximate cause of the injury.''

> *Schell vs. DuBois, Admr.,* 94 O. S. 93, at page 107;
> *Hannan, Admr. vs. Ehrlich,* 102 O. S. 176;
> *Pittsburgh, et al., Railway Co. vs. Bingham,* 29 O. S. 364;
> *The Baltimore & Ohio Southwestern Railway Co. vs. Cox, Admr.,* 66 O. S. 276;
> *St. Louis & S. F. R. Co. vs. Conarty,* 238 U. S. 243, at page 249.

> "The failure to give statutory signals, by bell and whistle, of the approach of a train to a highway crossing cannot be a ground for recovery in an action for wrongful death where it appears that the train, after passing the crossing and several hundred feet therefrom, struck the decedent as she attempted to cross the tracks on the private grounds of the company, where people were in the habit of crossing."

L. S. & M. S. Railway Co. vs. Harris, Admr., 13 Ohio Cir. Dec., 400.

Under Statutes requiring crossing signals to be given, it was held that:

> "Revised Statutes, Sections 3336 and 3337 are intended for the protection of such persons only as are crossing the track or are about to do so; and they do not inure to the benefit of persons who are on the track and not at a crossing. *Railroad Co. vs. Depew,* 40 Ohio St., 121, approved and followed."

The C. A. & C. Ry. Co. vs. Workman, Admr., 66 O. S. 509.

It is our contention, that since the plaintiff was not a member of the class for whose protection the statute was passed, the railroad's failure to operate its cars with air brakes was not, *as a matter of law,* negligence as to her, and the decision of the Court of Appeals, therefore, was erroneous.

III.

ERROR OF COURT OF APPEALS PREJUDICIAL.

The holding of the trial court and the Court of Appeals upon the Last Clear Chance Doctrine based upon the Federal Safety Appliance Act deprived the railroad company of its defense of contributory negligence which was clearly established in this case.

1. Last Clear Chance.

The trial court charged the jury that the Last Clear Chance Doctrine was applicable to the case. (Record, pages 335-336.) The Court of Appeals upheld this instruction *upon the ground that the pre-existing negligence of the Railroad Company in failing to couple the air hose at the interchange before the movement of the train commenced was a continuing negligence making this doctrine applicable.* (Record, pages 356-357.) The court in so holding entirely ignored the fact that there was nothing that the crew could do by way of connecting this air hose *after* the dangerous position of plaintiff was discovered. No case has been found sustaining the holding of the court, except the Utah case cited in its opinion. All other reported decisions hold that the negligence must have occurred after plaintiff's peril was discovered.

> "Doctrine of last clear chance does not apply, unless danger is actually discovered, since whole theory of doctrine is based on and confined to conduct subsequent to discovery of danger."

Penn. R. Co. vs. Swartzel, 17 Fed. Rep. (2nd) 869.

The Ohio rule is stated in the case of

The Cleveland Railway Company vs. Masterson, 126 O. S. 42,

the first syllabus being:

> "Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the 'last clear chance,' notwithstanding his negligence, if the defendant did not, after becoming aware of plaintiff's perilous situation, exercise ordinary care to avoid injuring him."

We call the attention of the Court to the fact that there was no claim of wanton or wilful negligence in this case.

2. Contributory Negligence Established.

The contributory negligence of the plaintiff was conclusively established by the testimony of herself and her daughter. It appears from their testimony that the plaintiff on two occasions only, looked toward the direction from which the train was coming, once at a point two hundred feet from the track when her view was obstructed by the orchard, and again when she was upon the railroad track and just as she was struck. Had she looked she must have seen the train approaching. Plaintiff's own evidence was that when she was 52 feet distant from the North rail, she had an unobstructed view to the East along the railroad tracks for a distance of 52 feet, when 40 feet from the North rail she had an unobstructed view for a distance of 78 feet. (Record, pages 50-51.) The range of vision increased rapidly so that from a point 22 feet from the North rail, until she was struck, the view was entirely unobstructed. (Record, pages 255-256.) The testimony on that point is set forth in Appendix B of this brief.

The law is well established as to the duty of a traveler upon the public highway when approaching a known railroad crossing.

> "One attempting to drive an automobile over a railroad crossing with which he is familiar is negligent so as to prevent recovery for his death by being struck by a train, where, when his view of the track is obstructed, he does not stop and look, and, if necessary leave the vehicle, to make sure that the crossing is safe."
>
> *The B. & O. Railroad Company vs. Goodman, Admrx.,* 275 U. S. page 66.

The Ohio rule is substantially the same.

The Pennsylvania Rd. Co. vs. Rusynik, 117 O. S. 530.

3. Error Not Cured.

The error complained of is not cured by any claim that the case might properly have been decided for the plaintiff upon an issue other than the application of the Safety Appliance Act.

St. Louis Iron Mtn. & So. Ry. Co. vs. McWhirter, 229 U. S. 265 at page 276,

> "Where a general verdict is rendered finding for the plaintiff, and the trial court errs in its instructions regarding the duty of the defendant under the last chance rule, the two issue rule cannot be relied on to uphold the verdict."

The Cleveland Ry. Co. vs. Masterson, 126 O. S. 42.

CONCLUSION.

The Court of Appeals having erred in holding that the Safety Appliance Act inured to the benefit of the plaintiff, a traveler upon the public highway, thereby depriving the defendant of the defense of contributory negligence, we respectfully submit the judgment should be reversed.

Respectfully submitted,

Elbert F. Blakely,
Harry T. Nolan,
Painesville, Ohio,

Atlee Pomerene,
Thomas M. Kirby,
Cleveland, Ohio,
Attorneys for Petitioner.

Alvord, Blakely & Ostrander,
Squire, Sanders & Dempsey,
Of Counsel.

APPENDIX A.

SAFETY APPLIANCE ACTS.

An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive-engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose.

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars.

Sec. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of Section one of this act, it may lawfully refuse to receive from connecting lines of road or shipper any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge, Provided, that nothing in this act contained shall apply to trains composed of four-wheeled cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended April 1, 1896, 29 U. S. Stat. at L., 85, ch. 87.)

Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Sec. 8. That any employe of any such carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Approved, March 2, 1893, 27 U. S. Stat. at Large, 531, ch. 196.

An Act to amend an act entitled, "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six. (Public No. 133, approved March 2, 1903.)

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

Sec. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

Sec. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

Approved, March 2, 1903, 32 U. S. Stat. at Large, 943, ch. 976.

ORDER OF THE INTERSTATE COMMERCE COMMISSION

JUNE 6, 1910.

IN THE MATTER OF REQUIRING AN INCREASE IN THE MINIMUM PERCENTAGE OF BRAKES

The Commission having under consideration the question of requiring an increase in the minimum percentage of power brakes to be used and operated on trains and railroads engaged in interstate commerce, as provided by section two of the Act of March 2, 1903, and it appearing to the Commission, after full hearing had on May 5, 1909, due notice of which was given all common carriers, owners and lessee engaged in interstate commerce by railroad in the United States, and at which time all interested parties were given an opportunity to be heard and submit their views, that to secure more fully the objects of the Act to promote the safety of employees and travelers on railroads, the minimum percentage of power-brake cars to be used in trains, as established by its order of November 15, 1905, should be further increased.

It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85% shall have their brakes so used and operated.

APPENDIX B.

1. Excerpts from the testimony of plaintiff's daughter, Lee Anna Meredith.

On Record, pages 91-92.

Q. At what speed did she drive after she headed out of her driveway down and coming to the railroad crossing?

A. Between twenty and twenty-five miles an hour.

Q. She started to slow down, did she, some time before getting to the railroad tracks?

A. Yes, sir.

Q. How close had she got to the railroad tracks before she started to slow down?

A. About two hundred feet.

Q. What did she do by way of slowing down?

A. Well, just gradually slowed down.

On Record, page 92.

Q. And from that point how did she operate the car, after she slowed down? Having slowed down somewhat, did she go at a uniform rate, or continue to go slower and slower as she got up to the point of the crossing?

A. I think she gradually slowed down.

Q. So, when you got up to the north rail of the track, how fast was the automobile going?

A. Just a few miles an hour.

Q. Can you tell the jury approximately how many?

A. About two or three miles an hour.

Q. Just barely moving?

A. Yes, sir.

Q. And for some little distance back you had been gradually going down to that speed?

A. Yes, sir.

Q. So that, back 20 or 25 feet from the crossing, how fast do you think your mother was driving the car that day?

A. Oh, about 7 or 8 miles an hour, probably.

On Record, pages 93-94.

Q. You saw at some time this tender that struck your automobile, did you?

A. Yes, sir.

Q. Where were you at that time with reference to the north rail of the track?

A. Right there.

Q. That was when you first saw the portion of the locomotive that was nearest you?

A. Yes, sir.

Q. Can you tell the jury how far it was from you when you first saw it,—from your automobile?

A. No, sir.

Q. Can you give us any idea?

A. It was right there.

Q. Practically together?

A. Yes, sir.

Q. Had you looked to the east at all before that, to your left?

A. Before I saw it?

Q. Yes.

A. No, sir.

Q. You had not looked to the east and so you did not see where your mother was looking, did you?

A. No, sir.

Q. And therefore you do not know whether she looked to the east or not,—I mean from your own knowledge?

A. No, sir.

Q. And then you say that was when the front wheels of the automobile in which you were riding was practically on the north rail?

A. Yes, sir.

Q. And you had not been looking to the east before that?

A. No, sir.

2. Excerpts from the testimony of the plaintiff.

On Record, pages 105-106.

Q. Now, after you went on down on the railroad tracks, you may state whether or not you reduced your speed?

A. I slowed down.

Q. After you got past the orchard give me your best judgment as to how fast you were going then?

A. I was practically stopped.

Q. Now, Mrs. Meredith, I understand you to say you knew of that crossing?

A. Yes, sir.

Q. And you knew of the orchard?

A. Yes.

Q. You know the physical situation there and have known it for a long time?

A. Yes, sir.

* * * * *

Q. When you looked to the left, what did you see, if anything, in the way of a train?

A. I saw a train right on the track, and we were right there at the same time.

On Record, page 114.

Q. On this occasion you started to slow down, I understood you to say in answer to Mr. Anderson, before you arrived at the track?

A. Yes, I did.

Q. You were going how fast before you started to slow down?

A. About 20 to 25 miles an hour.

On Record, page 115.

Q. Now, you were going 20 to 25 miles an hour. How far back from the railroad track did you start to slow down?

A. I cannot say exactly. I should judge around two hundred feet.

Q. When you were 200 feet back, from that time on you were reducing all the time?

A. Yes, sir.

On Record, page 116.

Q. When you came to the crossing, I think you said just before you went on it you thought you were going about two or three miles an hour?

A. Practically a stop.

Q. Didn't you say at the other hearing that you were going two or three miles an hour?

A. Yes; practically a stop.

On Record, page 116.

Q. That is not answering my question. Can you tell me whether after looking to the right you turned around to the other side and looked back towards the east?

A. I looked and turned my head back the other way.

Q. Now, at that time, when you turned back, as you say, the first you saw of this tender was just at the time that you were struck?

A. They were right there together, yes, sir.

Q. So, when you looked to the left, the first you saw of the tender was just as you were struck, is that right?

A. Yes; just at that time.

On Record, pages 116-117.

Q. With reference to when you first saw the tender was this question asked you the other day:—Question "Where were you at that time with reference to the railroad crossing," and was your answer "Right on the track"?

A. I think it was.

Q. And was this question asked you "You had not seen any part of this train until you were right there"; "as you say, right on the track," is that right?

A. I think so.

Q. Do you say or not that that was the fact?

A. That they were right there?

Q. Yes.

A. Yes, sir.

Q. Was your answer to that question that I have just read that you did not see any of it until you were right there on the track?

A. I did not see any train.

On Record, page 117.

Q. And the first time that you looked was when you looked to the right that you have told us about?

A. No; I glanced to the left first. There was an obstruction—the trees there on the left side, and then I glanced to the right again.

Q. When you glanced to the left first it was while the orchard was obstructing your view?

A. Yes, sir.

Q. And then the next time that you looked, you looked to the right and then back to the left as you have just described?

A. Yes, sir.

Q. Did that constitute the times that you looked?

A. Yes, sir.

On Record, page 118.

Q. You did not see that tender, even going at the rate of two or three miles an hour in time so that you could stop without being over on the track?

A. I did not see it until we were right together.

On Record, page 121.

Q. There is just one more question. In your testimony last week in your daughter's case, did you testify that the time that you first looked to see if the crossing was clear was as you estimated it, two hundred feet or more—perhaps two hundred feet?

A. I think probably I did.

Q. Is that correct?

A. Yes.

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In the Supreme Court of the United States

OCTOBER, 1933, TERM.

No. 820.

THE FAIRPORT, PAINESVILLE AND EASTERN
RAILROAD COMPANY,
Petitioner,

VS.

MAYME F. MEREDITH,
Respondent.

REPLY BRIEF FOR PETITIONER.

ELBERT F. BLAKELY,
HARRY T. NOLAN,
Painesville, Ohio,

ATLEE POMERENE,
THOMAS M. KIRBY,
Cleveland, Ohio,
Attorneys for Petitioner.

ALVORD, BLAKELY & OSTRANDER,
SQUIRE, SANDERS & DEMPSEY,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER, 1933, TERM.

No. 820.

The Fairport, Painesville and Eastern
Railroad Company,
Petitioner,

vs.

Mayme F. Meredith,
Respondent.

REPLY BRIEF FOR PETITIONER.

THE FACTS.

Ordinarily we would not be disposed to answer opposing counsel's statement of the facts. However, lest our silence may be taken for acquiescence, we feel required to refute some of the many mis-statements of fact appearing in respondent's brief, although we are of the decided opinion that the same are not relevant to the question involved in this case.

1. The railroad is two or two and one-half miles distant from the City of Painesville. (Record, page 283.) It nowhere approaches the City limits, and the statement in respondent's brief that it crosses streets in said City is untrue. Neither is Hardy Road within the limits of Painesville; on the contrary, it is some three miles distant. The entire movement on the day of the accident was in the country outside of any municipality.

2. The statement in respondent's brief, that a number of large trees along the side of the road were removed short-

ly after the accident, is untrue. Some of these trees, however, were removed the next year. (Record, page 145.) There were no trees on the railroad right of way, and the nearest tree mentioned was 85 feet distant from the crossing. (Record, pages 146-256.) The maps and exhibits introduced on both sides show the condition as it existed at the time of the accident. (Plaintiff's Exhibits B, 1, 2, 5. Defendant's Exhibits A and B.)

3. The railroad tracks used by this defendant in moving the train in question across the highway known as Federal Route No. 20 were the tracks of The New York Central Railroad Company, and not of this company. (See Plaintiff's Exhibits 6 and 8.) Respondent persists in the misleading statement that this company failed to maintain whistling posts at said crossing, and in the claim that the railroad failed to maintain whistling posts at other crossings. Whistling posts were maintained at every crossing on the main line, but not in the yards. Further, there is no statutory requirement in Ohio for the maintenance of whistling posts.

4. The respondent asserts that the train was caused to come to a stop, not by any efforts of the crew, "but by reason of the automobile under the tender." There is no evidence to support this statement. The record shows that the train gradually slowed down after the application of the brakes until it came to a stop. (Record, pages 207-237.)

5. The air hose was not coupled between any of these cars. (Record, page 64.)

6. On the main line the trains of this railroad were operated by train orders and by directions set forth in bulletins. Yard rules governed on that part of the railroad designated as the yard. (Record, pages 283-284.)

7. In respondent's brief, it is boldly stated that no signals were given. Six disinterested witnesses testified that

the signals were given, (Record, pages 171, 176, 178, 181, 182, 187, 188, 194, 200), and the crew also testified to that effect. (Record, pages 206, 218, 222, 234, 263.)

No witness other than the plaintiff and her daughter testified that signals were not given. One witness testified that he did not hear signals. (Record, page 59.)

8. In respondent's brief it is stated that the evidence overwhelmingly shows that there was no sand used on the rails while the engine was moving the 657 feet. No such evidence was introduced. The plaintiff made no effort to introduce any testimony relating to sand in chief, but in rebuttal called two or three witnesses who visited the scene some hours after the accident and after the train had been moved twice over the rails. They testified that they did not see any sand on the rails at that time. (Record, pages 308, 312.) The engineer operating the engine at the time of the accident died before the trial. His deposition had been previously taken by plaintiff wherein he testified that he applied sand. However, the deposition was not signed and therefore not offered in evidence, but the engineer's statement appears in this record in connection with the motion for a new trial. (Record, page 26.) No other testimony relating to sand was offered. The presumption that the engineer performed his full duty is not overcome by any testimony offered.

9. That one rail of the track was smeared with oil for a long distance and the other for a shorter distance is conclusively shown by the evidence. Four witnesses, three of whom were members of the train crew, testified that there was oil on the rails. (Record, pages 222, 223, 241, 267, 279, 280, 289.) Dr. Carmody, who treated the respondent at the hospital immediately after the accident, testified that there was oil on her clothing. (Record, page 137.) The same witnesses who testified that they saw no sand, also

testified that they did not see oil on the rails some hours after the accident. (Record, pages 308-310-312.)

10. In respondent's brief it is stated that "the evidence shows without any contradiction that in the exercise of ordinary care the train could have been stopped in less than 300 feet by the use of the air brakes on the tender and locomotive engine." That is a mis-statement. Plaintiff's own expert (Jones) testified that it would be "hard telling when you would stop" if there were oil on the rails. (Record, page 78.) It was testified by Mr. Dixon, the manager of the railroad, with experience as an engineer, that in his opinion the train could not have been stopped in any less distance. (Record, page 296.)

Moreover, the testimony of the witnesses, Fisher and Jones, called as experts by the plaintiff (respondent), was incompetent for the reason that the hypothetical questions propounded misstated some and entirely omitted other material and vital facts appearing in the evidence.

ARGUMENT.

I.

THE SAFETY APPLIANCE ACT.

Opposing counsel seems to misapprehend our position in regard to the Federal Safety Appliance Act. This train was engaged in interstate commerce at the time of the accident and the Federal Act is the only one which could possibly apply. We concede that this train was subject to the provisions of that act, but contend that this legislation does not inure to the benefit of the respondent, who was a traveler upon a public highway and not a member of the class for whose benefit the statute was passed.

However, if the Federal Act does not apply and the Ohio act does apply our position would be the same, for the Ohio act is substantially identical with the Federal Act

(*Erie Railroad Co. vs. Solomon,* 237 U. S. 427) and was not enacted for the benefit of travelers upon the public highway.

However, in respondent's brief it is stated that the Ohio "brake law" has been "interpreted to protect not only the railroad men and those on the train but all of its citizens, for the court of Ohio have consistently held just opposite of what opposing counsel contends." Respondent's counsel fail to cite any authorities whatever in support of this statement, and in fact there are none, for the rule is to the contrary so far as the courts have made any statements concerning it. The case of

McGarvey vs. Railway Company, 83 O. S. 273,

involved the application of the Ohio Safety Appliance Act in an action for injury suffered by an employe. The court said at page 287:

> "The object of the statute as stated in the title, was to promote the safety of employes and travelers upon railroads."

We have been unable to find any Ohio case holding that this act creates a duty in favor of any person other than an employe or traveler upon the railroad.

The courts of other states have passed adversely upon the contention of the respondent herein. It was held in the case of

Indianapolis & Cincinnati Traction Co. vs. Rogers, 79 Ind. 173, 134 N. E. 669,

that

> "In an action for injuries from being struck by an interurban car at a street crossing, it is error to give an instruction based on *Burns' Ann. St. 1914,* Section 5283, requiring steam and electric railways to equip cars with air and hand brakes, which has no application to the safety of the general public."

See also

Lindsey vs. Bluefield Produce & Provision Company, 91 West Va. 118, 112 S. E. 310.

Respondent cites the case of

Pennsylvania Railroad Co. vs. George R. Moses, Administrator, 42 Ohio Appellate 220.

The real point determined in that case is that "a violation of the orders of the Interstate Commerce Commission prescribing equipment for a locomotive engine engaged in interstate commerce constitutes negligence *per se*." The Boiler Inspection Act was not involved. At no time in that case was the direct question raised as to whether or not the order inured to the benefit of the plaintiff, a traveler upon the highway.

The order of the Interstate Commerce Commission referred to required that:

> "Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive engine men, to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight."

Whatever construction may be placed upon the order of the Interstate Commerce Commission relating to headlights, or upon the Hours of Service Act, it is to be borne in mind that these acts are not involved in the instant case. We are here concerned only with the construction of the Safety Appliance Act, which act, as we have hereinbefore pointed out, was designed to protect employes by requiring certain appliances for their safety.

II.

LAST CLEAR CHANCE.

Opposing counsel insist in their brief, that, under the allegations of the amended petition, the doctrine of the Last Clear Chance is involved. We deny this claim. It is true that in plaintiff's amended petition the third specification of negligence is as follows:

> "Third: In causing plaintiff said injuries when the defendant, through its employees, actually knew of the great danger in which plaintiff was placed so that said defendant had ample time in the exercise of ordinary care to have prevented said injuries after they had such actual knowledge."

The foregoing allegation is a mere conclusion, and not a statement of facts which would invoke the Last Clear Chance Rule. Furthermore, that conclusion is destroyed by the *facts* set forth in the amended petition, it being alleged:

> "That if said train could have been stopped short of the distance that it moved, no injury would have come to this plaintiff or her daughter; *that the reason that said train was not stopped many, many feet of less distance was because there were absolutely no air-brakes used nor could same be used* because of the failure of the conductor and other members of the crew to turn the angle-cock on the front of the nearest car to said locomotive engine and thereby permit the air to go into the train line, * * *." (Italics ours.)

It will be noted that the plaintiff did not aver that the engineer failed to use sand and did not aver that the members of the crew failed in any way to do everything possible after the danger of plaintiff was known. On the contrary plaintiff expressly avers:

> "Such actual danger was actually known to the said crew for all of such distance; *that nothing could be done by any member of the crew* upon any one of the thirty-two cars that would materially check the

movement of said train, and all of the brakes on said locomotive engine had been applied at or near to the highway crossing; *all of which was approximately produced by the failure to use and apply said stored air.*" (Italics ours.)

The plaintiff by these allegations confined her claim under the Last Clear Chance Rule to the failure of the Railroad to connect the air before the train movement commenced, which was about one half hour before the collision occurred. Since the plaintiff unequivocally pleaded that there was nothing which the crew could have done *after discovering* plaintiff's danger, it follows that the Last Clear Chance Rule was not involved in this case.

The Court of Appeals in the instant case held that the failure to connect the air was a continuing negligence. Under the pleadings, continuing negligence is the only basis under which the doctrine of the Last Clear Chance could be invoked. The court based its opinion upon the case of *Thompson vs. Salt Lake Transit Company*, 52 Pac. Rep. (Utah) 92, which is the only case we have found tending to hold that a liability exists under such circumstances. This decision, if adhered to, would destroy the theory of the Last Clear Chance doctrine which is based upon the failure to exercise reasonable care *after* the perilous position of plaintiff is known, or as some jurisdictions hold, *after* the perilous condition of the plaintiff is known, or ought to have been known. It utterly destroyed the defense of contributory negligence made in the instant case.

The true rule is laid down in the case of

Illinois Central R. Co. vs. Nelson, 173 Fed. Rep. 915

where it was held:

> "Under the rule that a railroad company may be liable for the injury of a person at a crossing, notwithstanding his contributory negligence, if after actually

> discovering his peril the servants of the company could by the exercise of ordinary care have avoided his injury, but failed to do so, the company cannot be held liable if such failure resulted from a defect in appliances of the train, which existed previously, and which made it impossible to stop the train in time, notwithstanding the efforts of the trainmen."

The court at page 916 noted with approval an excerpt from the decision of the court in the case of *St. L. & S. F. R. Co. vs. Summers,* 173 Federal 358, where the court cited the *Chunn* case mentioned in respondent's brief herein, relating to the doctrine of "Last Clear Chance" and said:

> "But in the application of this rule care must be taken to avoid undermining the rule of contributory negligence. Such negligence of the traveler, in law, fully exonerates the railroad company from the consequences of its original negligence, and some new and subsequent act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof unaided by the former acts, which have been excused by the traveler's contributory negligence. Let us, therefore, inquire whether the servants of the railroad company had actual knowledge of the peril of the decedent, and whether with that knowledge it exercised reasonable care to avoid injuring him?"

The court in its opinion said on page 917:

> "A defect in mechanical appliances, existing before and continuing until after the injury, not susceptible of being rectified after the discovery of the danger carelessly incurred and before the injury is done, is not supervening negligence within the rule invoked."

CONCLUSION.

The Court of Appeals of the Seventh Judicial District of Ohio, having erred in holding that the Federal Safety Appliance Act inured to the benefit of the plaintiff (respondent), we respectfully submit the judgment should be reversed.

Respectfully submitted,

Elbert F. Blakely,
Harry T. Nolan,
Painesville, Ohio,

Atlee Pomerene,
Thomas M. Kirby,
Cleveland, Ohio,
Attorneys for Petitioner.

Alvord, Blakely & Ostrander,
Squire, Sanders & Dempsey,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 820

THE FAIRPORT, PAINESVILLE & EASTERN
RAILROAD COMPANY,
Petitioner,

VS.

MAYME F. MEREDITH,
Respondent.

BRIEF OF RESPONDENT.

DAVID F. ANDERSON,
1226 Standard Bank Bldg.,
Cleveland, Ohio,
Attorney for Respondent.

ANDERSON & LAMB,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 820

The Fairport, Painesville & Eastern
Railroad Company,
Petitioner,

vs.

Mayme F. Meredith,
Respondent.

BRIEF OF RESPONDENT.

Section 11364 of the General Code of Ohio, among other things, provides:

> "* * * reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings, and judgment under review. In case such reviewing court shall determine and certify that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded and such judgment or decree under review shall be affirmed, * * *"

This Ohio law applied in full force and effect to the instant case. In addition, the Statutes of Ohio further provide:

> "Sec. 8949. No common carrier, engaged in moving traffic on a railroad, between points within this state, shall use on its line a locomotive therefor not

equipped with power driving wheel brakes and appliances for operating the train-brake system, or, in such business, run a train unless at least eighty-five percentum of the cars therein shall have air brakes thereon so arranged that they can be operated and used from the engine by the engineer of the locomotive drawing such train, and unless all of such cars so equipped shall be associated together."

If the Federal Safety Appliance law, as opposing counsel claim, does not apply in the instant case, then the State statute did. There was no conflict. The disobedience of either the Federal or State statute as a proximate cause was negligence *per se.*

The petition set out a case of ordinary negligence *and* of that which is known in Ohio as "Known Danger," which is ordinarily designated as "Last Clear Chance." Ohio law differs on this subject from the true doctrine of "Last Clear Chance" as laid down in the case of *Davis v. Mann,* 10 Messon & Welsby, 546, and in *Coasting Co. v. Tolson,* 139 U. S. 551; *R. R. Co. v. Ives,* 144 U. S. 408; *Chunn v. City R. R. Co.,* 207 U. S. 302.

> "1. Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the 'last clear chance,' notwithstanding his negligence, if the defendant did not, after becoming aware of plaintiff's perilous situation, exercise ordinary care to avoid injuring him."
>
> *Cleveland Ry. Co. v. Masterson,* 126 O. S. 42.

We had, under the laws of Ohio, the right to pursue our remedy under the "Known Danger" doctrine, which is *entirely separate and apart* from an ordinary negligence case.

> "4. A plaintiff may, in his petition, plead a case of ordinary negligence and may also plead a state of facts invoking the last chance rule; and he may re-

cover under whichever aspect the proof in the case assumes."

Cleveland Ry. Co. v. Masterson, 126 O. S. 42.

The petition contained, as a substantive ground of negligence, among other things, the following:

> "Third. In causing plaintiff said injuries when the defendant, through its employees, actually knew of the great danger in which plaintiff was placed so that said defendant had ample time in the exercise of ordinary care to have prevented said injuries after they had such actual knowledge." (R. p. 8.)

It will be necessary to some extent to understand the facts of the case, which were as follows. The accident happened at a grade crossing on an eighteen foot wide macadam road. To go upon the railroad company's tracks it was necessary for some little distance to go upon an upgrade. This highway in the summer time was very greatly used (the accident happened July 19, 1929), as it was the highway to be used by the traveling public from Painesville and other places in going to a recreation park. Where the railroad crossed the highway it was a very slight down grade in the direction the train was going. Mrs. Meredith, the plaintiff, was driving a Packard car and sitting on the lefthand side. Her daughter sat on the right side. The accident happened in daytime. As they approached the railroad there was an orchard on the left side of Mrs. Meredith, which completely obscured the approaching train and extended for eight hundred to one thousand feet and also obscured any view from anybody on a freight or other train for a like distance, and the limbs of the apple trees encroached upon the railroad's right of way quite a number of feet for the whole distance of eight hundred or one thousand feet. In other words, the people in an automobile could not see up the track until they were seventeen feet from the actual zone of danger and those on a train going the same direction as in the instant case could not see an automobile until they were beyond the apple trees which extended along the railroad tracks for eight hundred or one thousand feet, practically the same distance as they extended along the highway. Three people testified that no signal of any kind was given. It is admitted that there was no whistling post or any other designation where a whistle should be given as the train approached this highway. The evidence also showed that there was no whistling posts at a large majority of the grade crossings, although the railroad was pretty nearly twenty miles long and crossed *streets and highways* and also the much used Federal highway known as No. 20, between Cleveland and Buffalo.

It was agreed that just immediately before the collision with the Packard car the train was moving in a backward motion at ten miles an hour. The locomotive engine was pulling thirty-two cars, all of which were loaded but nine. That a large majority of the thirty-two cars had been brought by the New York Central Railroad to the yards just before this train had been moved. The train was clearly engaged in interstate commerce, for a majority of the loaded cars had been brought on a continuous passage from places outside of the State of Ohio and was to be delivered to their destination by the train in question. As a matter of fact, the railroad had three places at which it received interstate commerce. Two were connected by yards with two trunk roads and also by a dock on the shores of Lake Erie.

It was the undisputed evidence that the railroad employes were furnished no rules of any kind, nor never had been, and that on the day of the accident none of the brakes at all upon the thirty-two cars could be operated by air. The air on the locomotive engine and the tender could be used but no air coupling was made between the locomotive engine and the box car next to it. It was testified and not denied, that for a long time before this accident the train was hauled without the use of air brakes on the cars.

The Packard car was struck practically in the middle and then *carried on the locomotive engine six hundred and fifty-seven feet* and then the train stopped because the Packard car had been pulled, by a projecting tie, under the tender itself (R. pp. 60, 301), and there is no dispute that no injury had been received by either of the ladies in the automobile until after it was pulled under the tender and until the train had moved six hundred and fifty-seven feet beyond where the collision took place.

A large majority of the employees of the railroad company lived in Painesville, where the case was tried, and although the testimony showed that the train under the circumstances, in the exercise of ordinary care, could have been stopped in less than three hundred feet.

C. L. Fisher, Expert—

> "Q. Now, assuming a locomotive engine to be a little over 150,000 pounds, and the tender being 100,000 pounds, and standardized brakes, such as you have suggested, within what distance on a 1½ per cent grade could, in great emergency, a train be stopped, when it was pulling 32 cars, all of which were loaded except 9, using all of the things that you do use in an emergency?
>
> * * * * *
>
> Q. At ten miles an hour, on that grade at ten miles an hour, within what distance?
>
> A. Less than three hundred feet." (R. p. 81.)

No attempt was made to contradict the testimony of this expert witness Fisher and other railroad men who testified as to the distance within which the train could be stopped. Mrs. Meredith and her daughter were carried the six hundred and fifty-seven feet in the Packard car, which was balanced on the end of the tender, part of the Packard car extending over each side of the train. When the carried automobile struck the projecting ties it was *then* pulled under the train, resulting in great and permanent injuries to the occupants of the automobile, Mrs. Meredith receiving such injuries that her leg had to be amputated between the knee and the hip.

Immediately before the collision the evidence shows without any dispute that the front brakeman, who was on the front of the tender, the fireman, and the engineer knew of the great danger of the Meredith ladies because they knew that the collision couldn't be avoided, and that after the collision the automobile was being carried on the front of the tender. The locomotive engine they were using was standardized and air was being used in the manipulation of the brakes of the tender and on the locomotive itself. The locomotive engine was provided with a filled sand box that would convey sand to either or both rails of the track. The sand was *white* and could be easily seen. Yet a number of witnesses testified that no sand was used in the six hundred and fifty-seven feet that the locomotive engine went from the crossing to the place that it afterwards stopped on top of the Packard car. See testimony of:

William Conlin, Record, page 217;
John Fitzgerald, Record, page 231;
James Doubledee, Record, page 280;
L. L. Dixon, Record, page 301;
Albert Isabel, Record, page 305;
Isabelle Isabel, Record, page 308;
Ralph Andrus, Record, page 312.

We had the legal right, beyond question, to have the Court direct a verdict on the doctrine of "Known Peril" in favor of the plaintiff, for practically all of the evidence affecting the case of "Last Clear Chance" or "Known Peril" was not disputed. The fact of actual knowledge of the great danger of the plaintiff and her daughter; and the fact that the train was only moving ten miles an hour at the time of the collision; the fact that no air could be used in the thirty-two cars because of failure to couple the air; the fact that the train could have been stopped in less than half the distance it moved; the fact that no injury occurred to either of the occupants of the Packard car until after they had gone twice as far as the train could have been stopped in the exercise of ordinary care, were not disputed or no attempt was made to dispute these facts.

It made no difference in law on the issue of "Last Clear Chance" whether the Federal Safety Appliance Statute applied or not. Therefore, clearly "substantial justice" was done as the reviewing court in Ohio held in affirming the judgment.

DID THE PLAINTIFF RECEIVE ANY PROTECTION AT ALL FROM THE SAFETY APPLIANCE LAW IN REFERENCE TO AIR BRAKES?

Opposing counsel cite as the only alleged authority that the plaintiff received no protection at all by reason of the Federal Safety Appliance law, the preamble, which among other things provides:

> "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive-wheel brakes, *and for other purposes.*" (The italics are ours.)

If the Federal law was passed solely and wholly for the protection of those on the train and the employes of railroad companies then the State of Ohio statute applied in full, for then the Congress of the United States had not invaded that field, and a charge of the Court that a violation of the brake statute acting as a proximate cause was negligence *per se* is not error.

> "4. The preamble is no part of an Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous."

Railway Co. vs. Thomas, 132 U. S. 174.

Chief Justice Fuller:

> "But as the preamble is no part of the Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the Legislature is in itself fatal to the claims set up."

Railway Co. vs. Thomas, 132 U. S. 174, at page 188.

McCabe, J.:

> "It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil; * * *."

State of Indiana vs. Oil Company, 47 L. R. A. 632, 633.

> "Both in England and this country, it was at one time a common practice to prefix to each law a preface, prologue or preamble, stating the motives and inducements to the making of it; but it is not an essential part of the statute, and is now frequently, if not generally, omitted."

Sedgwick on Statutory and Constitutional Law, at p. 42.

> "But where the language of the statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolved upon the court

> of ascertaining the true meaning. If the intention of the legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law."
>
> 36 *Cyclopedia of Law and Procedure,* 1107.

Exactly the question raised by the railroad company in the instant case has been passed on and determined by a Court in Ohio, in the case of *Pennsylvania R. R. Co. vs. George R. Moses, Admr.,* decided October 28, 1931, by the Court of Appeals, and found in Ohio Law Bulletin and Reporter of July 4, 1932, page 491. In this *Moses* case the facts show that the accident happened at a grade crossing in Ohio and that there was a violation of the Federal Safety Appliance laws in reference to equipment of the locomotive engine. The Court of Appeals held, in reference to the violation of the Federal Safety Appliance Act, that there was no error in charging that such violation was negligence *per se.*

Yet it is the claim of opposing counsel that the many thousands of Ohio citizens and others who are constantly using the many grade crossings in the night season are not protected by the Federal Safety Appliance laws in reference to the headlight on the locomotive and that only the men employed by the railroad companies or passengers are in any way or to any degree protected.

Take for instance the Federal "hours of service" law and assume that the engineer in operating a train across a grade crossing in Ohio had been employed much in excess of the hours therein mentioned and by reason of such overwork his ability to exercise his faculties had been very greatly diminished or destroyed and as a proximate cause thereof people attempting to cross the railroad tracks in an automobile had been severely injured or killed. Can it be claimed, within the exercise of common sense or justice, that the violation of the Federal "hours of service" law should not be taken into consideration in a suit against the railroad company?

Respectfully submitted,

David F. Anderson,
Attorney for Respondent.

Anderson & Lamb,
Of Counsel.

In the Supreme Court of the United States

OCTOBER, 1933 TERM.

No. 820.

THE FAIRPORT, PAINESVILLE AND EASTERN
RAILROAD COMPANY,
Petitioner,

VS.

MAYME F. MEREDITH,
Respondent.

BRIEF FOR RESPONDENT.

DAVID F. ANDERSON,
1226 Standard Bank Bldg.,
Cleveland, Ohio,
Attorney for Respondent.

ANDERSON & LAMB,
Of Counsel.

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THE FAIRPORT, PAINESVILLE AND EASTERN
RAILROAD COMPANY,
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MAYME F. MEREDITH,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS AND ARGUMENT.

Mrs. Meredith and her daughter, who was a young lady, approached the grade crossing along Hardy Road in daylight, where the collision took place. Hardy Road is in the outskirts of the City of Painesville, a City of about 11,000 population. Hardy Road is very largely used for the purpose of going to a large park of many amusements, located on the shore of Lake Erie and a short distance from the crossing. An apple orchard extended along the highway on the lefthand side in the direction Mrs. Meredith was driving about eight hundred feet and about the same distance along the railroad right of way. *It was utterly impossible for people in automobiles to see the movement of a car or cars on the railroad. It was equally utterly impossible, because of the orchard, for anyone on a train to see an automobile approaching the crossing on the highway.* (See exhibits 3 and 5.) In addition to the orchard, there were a number of large trees between the orchard and the highway along the macadam road, which shortly after the accident were removed, the stumps remaining. Along the railroad right of way the limbs of the apple trees extended over and encroached upon the right of way quite a number of feet. The measured distance from where the ladies in the automobile would have a clear view of the railroad was only seventeen feet to the danger zone of the cars moving on the railroad.

There was no signal of any kind given. There was no whistling post or never had been any, or anything else to designate where the whistle should be sounded. The train was drifting as it approached the crossing.

It was agreed between counsel that at the time of the collision or just immediately before the collision the train was moving at ten miles an hour. The tracks of the railroad itself, at the time of the accident, were not the same as at the time of trial, for a few days before the trial the railroad company had caused the tracks to be ballasted from the crossing to the place of the accident or a short distance beyond. The Packard car in which the ladies were riding was struck in the middle on the left and picked up on the tender of the locomotive engine (the car projecting beyond each side of the train) and carried six hundred and fifty-seven feet, and for all of that distance no injury of any kind had been caused the occupants of the automobile. At six hundred and fifty-seven feet a tie projected above the other ties some inches and it caught the automobile, pulling it under the train, at which time all of the great injuries were occasioned the occupants. The train then was caused to come to a stop, not by any of the efforts of the crew but by reason of the automobile under the tender. In fact the one hundred thousand pound tender *had been raised from the rails by reason of the automobile under the wheels.*

Three members of the crew, all on the backing tender, knew of the situation immediately before the collision and at all times thereafter. The front brakeman, John Fitzgerald, was on the running board of the tender when he first saw the automobile a short distance away. He then, in attempting to get away from the effects of the collision went up the ladder on the back of the tender, with his back towards the moving automobile. The automobile approached the crossing on the fireman's side and the fireman before there was any collision knew of the danger. He immediately notified the engineer and the engineer then applied the air brakes on the tender and the locomotive engine. There were thirty-two cars being pulled, nine of them not loaded. They had been brought from the New York Central yards where they had been brought from other states and left standing, coupled together, immediately before the accident. The thirty-two cars were all coupled together after they had been taken from the New York Central train, and left in that position until they had moved to the place of the accident. (R. p. 269.)

When Doubledee, the conductor, coupled his locomotive to the thirty-two cars he did not couple the air, although it would have required only a couple of seconds to have done so. The same locomotive engine had taken about forty cars from different places along its line to the New York Central Railroad and then the locomotive engine had been coupled to the thirty-two standing cars by the conductor. The conductor after making the coupling, together with the rear brakeman, had gone to the rear of the thirty-two cars, the conductor on one side of the cars and the rear brakeman on the other, so as to see that they were properly coupled together, and they remained at the rear of the thirty-two cars until the time of the accident. The air was not coupled. Therefore the engineer at the time of the collision at the crossing was wholly unable to use any of the brakes on the thirty-two cars. Among the thirty-two cars there were a number of loaded coal cars which had been brought in from Virginia and Pennsylvania on a continuous trip and which were being moved by the defendant company to be delivered to their destination, which destination was beyond the Hardy Road crossing. These thirty-two cars were to be moved to the Alkali Plant, which was a short distance beyond where the accident occurred.

The defendant's railroad was about twenty miles in length and for a long number of years had been delivering loaded cars from the Baltimore & Ohio, the New York Central and from a lake port on Lake Erie. Only a small number of a total number of grade crossings was or had been at any time protected by whistling posts or places designated as the place to sound the whistle. Many of the crossings were at streets in villages and the City of Painesville. Among the crossings was Federal 20, over which the train of thirty-two cars moved before it reached the Hardy crossing which is a grade crossing on the constantly used Federal highway between Cleveland and Buffalo, which crossing was not protected by whistling posts or anything else which would indicate where the whistle should be sounded if at all and for many, many years before this particular accident interstate freight was being delivered to its destination by trains hauled by the defendant company without air being used except to operate the brakes on the locomotive engine and the tender, for it was originally the contention in the lower courts, by the railroad company, that the Safety Appliance laws—Federal or State—did not apply to its cars. There were no rules of any kind whatever furnished to members of the different crews and that was true for all of the time of the existence of the railroad.

We claim, and we believe we are amply justified by reason of the evidence, that aside from all other claims Mrs. Meredith has a right to recover in her case because of "last clear chance" or "known danger," as set out in the petition as follows:

> "Third. In causing plaintiff said injuries when the defendant, through its employees, actually knew of the great danger in which plaintiff was placed so that said defendant had ample time in the exercise of ordinary care to have prevented said injuries after they had such actual knowledge." (R. p. 15.)

The evidence shows a perfect "known danger" case. "Last clear chance" in its purity was established in the English case of *Davies v. Mann*, 10 Messon & Welsby 546. "Last clear chance" always embraces "known danger"; "Known danger" does not always embrace "last clear chance," and in Ohio we have now the "known danger" rule only.

The Supreme Court of the United States in three cases, and we believe only three, has applied in full the law of the English courts.

> *Coasting Co. v. Tolson*, 139 U. S. 551;
> *RR. Co. v. Ives*, 144 U. S. 408;
> *Chunn v. City RR. Co.*, 207 U. S. 302.

Of necessity, no contributory negligence could be successfully urged in a case of "known danger." Just before the trial of the instant case the Supreme Court of Ohio finally established its present doctrine and we have now, as laid down in that case, the following:

> "1. Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the 'last clear chance,' notwithstanding his negligence, if the defendant did not, after becoming aware of plaintiff's perilous situation, exercise ordinary care to avoid injuring him.
>
> "4. A plaintiff may, in his petition, plead a case of ordinary negligence and may also plead a state of facts invoking the last chance rule; and he may recover under whichever aspect the proof in the case assumes."

Cleveland Ry. Co. v. Masterson, 126 O. S. 42.

1. It was admitted that the speed of the train, at the time of the collision, or just immediately before, was ten miles an hour.

2. It was admitted that there was no air coupled between the locomotive engine and the next car of the thirty-two cars.

3. There is no dispute but that the train moved six hundred and fifty-seven feet after the collision.

4. There is no dispute but that at least three of the crew of the trainmen, among them the engineer, knew of the great and imminent danger to the women in the automobile.

5. There is no dispute but that the Packard car was struck in the middle and picked up on the tender of the locomotive engine and in that position carried six hundred and fifty-seven feet and that neither of the ladies in the car were injured until after they arrived at the six hundred and fifty-seven feet.

6. There is no dispute but that a projecting tie at last pulled the Packard car under the tender. (See map, exhibit 8.)

7. The evidence overwhelmingly shows that there was no sand used on the rails while the engine was moving the six hundred and fifty-seven feet. No one testified that sand was used.

8. The proof overwhelmingly shows that there was no oil on the tracks or rails from the place where the Packard automobile was under the tender at the crossing where the collision occurred.

9. The evidence shows, without any contradiction, that in the exercise of ordinary care the train could have been stopped in less than three hundred feet by the use of the air brakes on the tender and the locomotive engine. (See

testimony of experts, C. L. Fisher and Josiah Jones, R. pp. 81 and 75:)

> "The province of the jury is to find the facts, but the facts being found or conceded, it is the duty of the court to declare the law applicable to such facts * * *."

Railway Co. v. Liidtke, 69 O. S. 400-401.

Shauck, *J.*—

> "It is subversive of the public interests and promotive of no right of either party to continue a contest before a jury when nothing is involved but the application of the law to a state of facts conclusively established."

Gas & Elec. Co. v. Archdeacon, 80 O. S. 39.

It is the law of Ohio that "A plaintiff may, in his petition, plead a case of ordinary negligence and may also plead a state of facts invoking the last chance rule; *and he may recover under whichever aspect the proof in the case assumes."—Cleveland Ry. Co. v. Masterson,* 126 O. S. 42. (Italics ours.)

DID THE FEDERAL SAFETY APPLIANCE LAWS GOVERN?

Assume that under the Federal "hours of service" law a locomotive engineer, by lack of sleep and rest, could not properly exercise either sight or hearing and the failure to exercise sight and hearing was the proximate cause of injuries to persons in an automobile on a grade crossing. Would the injured people in the automobile receive no protection under the Federal "hours of service" law?

Assume that in the night season an automobile was struck at a grade crossing and there were no lights at all, or defective lights, used on the front of the locomotive engine. Could not the injured people in this hypothetical case receive any benefit by reason of the Federal laws in reference to the kind of headlights a locomotive should use?

Again, if the Federal Safety Appliance laws, as claimed by opposing counsel, did not apply, then the State law on the same subject—brakes—did apply and the Courts of Ohio have so held. The statutory law of Ohio on this subject, provides:

SEC. 8949, General Code of Ohio:

> "No common carrier, engaged in moving traffic on a railroad, between points within this state, shall use on its line a locomotive therefor not equipped with power driving wheel brakes and appliances for operating the train-brake system, or, in such business, run a train unless at least eighty-five percentum of the cars therein shall have air brakes thereon so arranged that they can be operated and used from the engine by the engineer of the locomotive drawing such train, and unless all of such cars so equipped shall be associated together."

If the Federal laws did apply, then, because the Congress of the United States had invaded the field of brakes, the State law would not apply *and only because of the invasion by Congress.* If the subject of brakes, so far as the citizens of Ohio are concerned, did not apply, and the Federal Safety Appliance laws were silent on that subject, *~~then there~~ was no invasion of that field,* and the State law instead of hibernating would be alive and in full force.

It can hardly be said that there was prejudicial error directly affecting the railroad company, in not obtaining a fair trial by saying that the Trial Judge used, in reference to the brake law, in his Charge, that they were laws of the United States; for if they applied, there was no error and if they did not apply there was no invasion of the State's rights to make such laws for the State of Ohio had enacted a brake law which had been interpreted to protect not only the railroad men and those on the train but all of its citizens, for the courts of Ohio have consistently held just opposite of what opposing counsel contends.

There was a grade crossing accident where people in an automobile were injured by being struck by a locomotive engine. The Federal Boiler Inspection Act required that a locomotive should be equipped with a headlight but the headlight was not such a one as required by the Interstate Commerce Commission. That the Interstate Commerce Commission had the power to promulgate such a rule can not be questioned. (See *Napier vs. Atlantic Coast Railroad Company,* 272 U. S. 432.) It was charged in this State case of *Pennsylvania R. R. Co. v. George R. Moses, Admr.,* that The Boiler Inspection Act did apply and the Judge charged the jury that the railroad company was guilty of negligence *per se.* *Pennsylvania Railroad Company vs. George R. Moses, Admr.,* decided October 28th, 1931, by the Fifth District Court of Appeals, found in 42 Ohio App. 220.

DOES THE PREAMBLE CONTROL?

A preamble does not necessarily limit the application of an Act, especially where the preamble if followed strictly would very greatly narrow the limits of the Act itself, much to the harm of citizens generally.

> "4. The preamble is no part of an Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous."

Railway Co. vs. Thomas, 132 U. S. 174.

Chief Justice Fuller:

> "But as the preamble is no part of the Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the Legislature is in itself fatal to the claims set up."

Railway Co. vs. Thomas, 132 U. S. 174, at page 188.

McCabe, *J.*:

"It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil; * * *".

State of Indiana vs. Oil Company, 47 L. R. A. 632, 633.

"Both in England and this country, it was at one time a common practice to prefix to each law a preface, prologue or preamble, stating the motives and inducements to the making of it; but it is not an essential part of the statute, and is now frequently, if not generally, omitted."

Sedgwick on Statutory and Constitutional Law, at p. 42.

"Once adopt the principle that such facts are conclusive, or even *prima facie* evidence against private rights, and many individual controversies may be prejudiced, and drawn from the sanctions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the Legislature are to make laws to operate on future incidents, and not a decision or forestalling of rights accrued or vested under previous laws. Such a preamble is evidence that the facts were so represented to the Legislature, and not that they are really true".

Sedgwick on Statutory and Constitutional Law, at p. 44.

Respectfully submitted,

David F. Anderson,

Attorney for Respondent.

Anderson & Lamb,

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 820.—October Term, 1933.

The Fairport, Painesville & Eastern Railroad Company, Petitioner, *vs.* Mayme F. Meredith.	On Writ of Certiorari to the Court of Appeals, Seventh Judicial District of the State of Ohio.

[June 4, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

Respondent recovered judgment against petitioner upon the verdict of a jury in an Ohio state court of first instance for a personal injury resulting from a collision at a railroad-highway crossing between an automobile which she was driving and a train of cars operated by petitioner over its line of railroad. There is evidence that the train approached the crossing without sounding the whistle of the engine or ringing the bell so as to give warning of the train's approach. There is also evidence which fairly establishes that as respondent drew near the crossing the train was in plain view for a sufficient length of time to have enabled respondent, by the use of ordinary care, to see the train, stop and avoid the collision, and, therefore, that she was guilty of contributory negligence. *Miller* v. *Union Pacific R. Co.*, 290 U. S. 227, 231. The train was equipped with air brakes, in conformity with the federal Safety Appliance Act, as amended, U. S. C., Title 45, c. 1, §§ 1 and 9,[1] and the orders of the Interstate Commerce Commission made

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[1] Section 1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Section 9. Whenever, as provided in this chapter, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which thereunder; but the air was disconnected between the cars and the engine, leaving the brakes of the engine and tender as the only means of stopping the train or checking its speed, thus constituting a clear violation of the act, since the requirement that a train shall be equipped with power brakes necessarily contemplates that they shall be maintained for use. See *United States* v. *Great Northern Ry. Co.*, 229 Fed. 927, 930.

The complaint alleges, as one ground of negligence, failure on the part of petitioner to make an air connection between the engine and cars, and to maintain and use the power brakes. In respect of that ground of negligence the trial court instructed the jury, in effect, that if the violation of the federal act resulted proximately or immediately in the injury complained of, the railroad company was liable. But the jury was also told that if respondent was guilty of contributory negligence she could not recover notwithstanding the negligence of petitioner. The trial court also instructed the jury in respect of the doctrine of the last clear chance —its view apparently being that, notwithstanding the contributory *negligence* of respondent, petitioner would be liable if, after the danger to respondent became apparent, it could have avoided the injury but for its antecedent failure to maintain and use an equipment of air brakes such as required by the federal act.

The appellate court, in sustaining the judgment of the trial court, held: (1) that the federal law violated by petitioner was enacted not only for the protection of railroad employes and passengers on railroad trains, but the public generally—that is to say, as applied to the present case, that the requirement of the federal Safety Appliance Act as to power controlled brakes and their use imposed a duty upon the railroad company in respect of travelers at railroad-highway crossings; and (2) that the instructions of the trial court in respect of the doctrine of the last clear chance correctly stated the law. — Ohio App. —.

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are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said chapter, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and a failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

These two rulings present the questions which the writ brings here for consideration.

First. The contention of petitioner is that the federal Safety Appliance Act was intended only for the protection of employes and travelers upon the railroads, and has no relation to the safety of travelers upon highways or of the public generally. Very likely, the primary purpose in the mind of Congress was to protect employes and passengers. So much is indicated by the title—"An act to promote the safety of employes and travelers upon railroads" etc. And this is borne out by the history of the legislation. President Harrison in his first annual message to Congress called attention to the need of legislation for the better protection of the lives and limbs of those engaged in operating the interstate freight lines of the country, and especially the yard men and brakemen, and expressed the view that Congress had power to require uniformity in the construction of cars used in interstate commerce and the use of approved safety appliances upon them.

But we are asked to hold that the title expresses the sole intent of the act, and this involves a question of statutory construction. The title of an act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity. *Patterson* v. *Bark Eudora,* 190 U. S. 169, 172; *Cornell* v. *Coyne,* 192 U. S. 418, 430; *Lapina* v. *Williams,* 232 U. S. 78, 92. Compare *Russell Co.* v. *United States,* 261 U. S. 514, 519, 522. But here the words of §§ 1 and 9 of the act speak plainly and nothing in the nature or operation of the legislation requires, or suggests the necessity of, an appeal to extrinsic aids to determine their meaning. It may be that the protective operation of § 2 of the act requiring automatic couplers[2] was not meant to extend to persons other than employes. Compare *St. L. & San Fran. R. R.* v. *Conarty,* 238 U. S. 243; *Louisville & Nashville R. R. Co.* v. *Layton,* 243 U. S. 617, 620; *Lang* v. *New York Cent. R. R. Co.,* 255 U. S. 455; *Davis* v. *Wolfe,* 263 U. S. 239, 243; *Philadelphia & R. Ry. Co.* v. *Eisenhart,* 280 Fed. 271. But the installation and use of power brakes required by §§ 1 and 9 so obviously contribute to the safety of the traveler at crossings that it is hardly probable that Congress could have contemplated their inapplicability to that situation.

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[2] Section 2. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Section 9, *supra*, provides that when a train is operated with power or train brakes, not less than 50 per cent. (under regulation of the Interstate Commerce Commission now 85 per cent.) of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing the train. That a train so equipped and operated can be brought to a stop much more quickly than by the use of hand brakes is, of course, perfectly clear; and it is reasonable to conclude that a result so readily perceivable lies within the purview of the requirement. The most important purpose of a brake upon any vehicle is to enable its operator to check its speed or stop it more quickly than would otherwise be possible. The old railway hand brake was principally for that purpose, but it was undesirable for two reasons—first, because in setting it the brakeman was exposed to danger, and second, and especially in the case of long heavy trains, it did not meet the necessity of stopping the train quickly in emergencies. In this second aspect, the common law duty of the railway company to use ordinary care to provide and keep in reasonably safe condition adequate brakes for the control of its trains was one owing, among others, to travelers in the situation which the respondent here occupied. Sections 1 and 9 of the Safety Appliance Act converts this qualified duty imposed by the common law into an absolute duty, from the violation of which there arises a liability for an injury resulting therefrom to any person falling within the terms and intent of the act. Compare *Louisville & Nashville R. R. Co. v. Layton*, *supra*, 620; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 295. To confine the beneficial effect of these provision to employes and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statute imposing the duty as including all of them.

It fairly may be said that the nature of the duty imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to invoke its protection. In

Atchison, T. & S. F. R. Co. v. *Reesman*, 60 Fed. 370, where the railroad company failed to erect and maintain sufficient fences, as required by a state statute, in consequence of which an animal got upon the track and derailed the train, it was held that an employe upon the train who was injured was entitled to recover under the statute. In the opinion, delivered by Mr. Justice Brewer (pp. 373-374), it is said:

> "At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. It may well be said that, though primarily intended for the benefit of one class, it was also intended for the protection of all who need such protection. . . . The purpose of fence laws, of this character, is not solely the protection of proprietors of adjoining fields. It is also to secure safety to trains. That there should be no obstruction on the track is a matter of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains, and those who are traveling thereon, is the same. To prevent such obstruction being one of the purposes of the statute, any one whose business calls him to be on a train has a right to complain of the company, if it fails to comply with this statutory duty."

See also *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228, 239-240, and other authorities cited in the *Reesman* case.

In the light of what has now been said, it follows that the duty imposed upon petitioner by the provisions of the act in respect of power controlled brakes extends to and includes travelers at railway-highway crossings.

Second. The holding of the court below as to the doctrine of the last clear chance is challenged as being contrary to the weight of American authority;[3] but we are precluded from considering the contention because it does not present a federal question. The federal Safety Appliance Act, as we already have said and this court repeatedly has ruled, imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law. The act does not affect the defense of contributory negligence, and, since the case comes here from a state court, the validity of that defense must be determined in accordance with applicable state law. *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 214 *et seq.*, and cases cited; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, — U. S. —, April 2, 1934. And see *Schlemmer* v. *Buffalo, Rochester, &c. Ry.*, 205 U. S. 1, upon second appeal, 220 U. S. 590, 598. The same is true of the doctrine of the last clear chance, which likewise is not affected by the act. If doubt might otherwise exist in respect of the specific application of the cases cited to that doctrine, regarded independently, the doubt would vanish when consideration is given to the relation which it bears to the rule of contributory negligence, namely, that it amounts in effect to a qualification of that rule, *Atchison, T. & S. F. Ry. Co.* v. *Taylor*, 196 Fed. 878, 880, having the result of relieving the injured person from the consequences of his violation of it.

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[3] See, for example, Illinois Cent. R. Co. *v.* Nelson, 173 Fed. 915; St. Louis & S. F. R. Co. *v.* Summers, 173 Fed. 358; Smith *v.* Railroad, 114 N. C. 728, 734-735; Hays *v.* Railway, 70 Texas 602, 607. *Contra:* Thompson v. Salt Lake Rapid Transit Co., 16 Utah 281, 292.

Nothing we have said is to be understood as indicating our acceptance, as a substantive principle, of the ruling of the court below in respect of the point. That question is left open for consideration and determination when, if ever, it shall be so presented as to admit of its being dealt with upon its merits.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.